Autumn 1954
VOLUME 3 • NUMBER 4

THE *American Journal of* COMPARATIVE LAW

A QUARTERLY

Editor-in-Chief: HESSEL E. YNTEMA

The American Journal of

COMPARATIVE LAW

Editorial communications and books for review should be addressed to American Journal of Comparative Law, Legal Research Building, University of Michigan, Ann Arbor, Michigan.

THE AMERICAN JOURNAL OF COMPARATIVE LAW

Published by American Association for the Comparative Study of Law, Inc., quarterly in January, April, July, and October, at Baltimore, Maryland. Editorial offices, Legal Research Building, University of Michigan, Ann Arbor, Michigan. Subscription, $5.00 per year, $1.50 per number. If subscriber wishes his subscription discontinued at its expiration, notice to that effect should be sent; otherwise it is assumed a continuation is desired.

Change of Address: Send your change of address to the American Journal of Comparative Law, Legal Research Building, University of Michigan, Ann Arbor, Michigan, at least 30 days before the date of the issue with which it is to take effect. The Post Office will not forward copies unless you provide extra postage. Duplicate copies will not be sent.

The American Journal of
COMPARATIVE LAW

VOLUME III *Autumn 1954* NUMBER IV

CONTENTS

VICTOR C. FOLSOM

Chattel Mortgages and Substitutes Therefor in Latin America

THE SUBJECT OF SECURITY TRANSACTIONS in personal property is one which has recently been receiving much attention in the United States. Article 9 of the proposed Uniform Commercial Code represents an attempt to codify many divergent concepts which have developed in our states. Exhaustive commentaries on the subject were published with the official draft of the Code,[1] and in January 1954 there appeared a two-volume study of the proposed text.[2] The importance of such transactions to expanding industrial economies is apparent. Most of the countries of Latin America are in the process of hurried industrialization and are increasing their use of this type of transaction to expand sources of credit and promote production. Blessing or not, the era of installment selling seems to be about to descend in full force upon our consumer friends to the South. In addition, other types of secured transactions such as inventory and accounts receivable financing, factoring, agricultural commodity loans, loans secured by investment securities, warehouse receipts, etc., will become more important with increased industrial and commercial development. This paper will attempt to point out that the legal framework upon which this credit structure will be based in Latin America is different from that which was developed in Anglo-American law. The scope of the pledge, which has a limited function in our law, is being expanded to serve as the principal form of secured transaction in personalty. In a sense, this development, although later in time, is a parallel development to the expansion in the common law of the use of the chattel mortgage.

The traditional pledge under both the common law and the civil law

---

VICTOR C. FOLSOM is a member of the Bars of New York and California and a specialist in Latin-American law.

This article is based upon a report prepared for the Latin-American Law Committee of the Section of International and Comparative Law of the American Bar Association. The author is indebted to his many friends in the legal profession in Latin America who have contributed valuable suggestions and more material than could be included.

[1] *Uniform Commercial Code*, official draft published by The American Law Institute and the National Conference of Commissioners on Uniform State Laws, 1952.

[2] *Secured Transactions under the Uniform Commercial Code*, prepared by Harold F. Birnbaum and published by the Committee on Continuing Legal Education of the American Law Institute in collaboration with the American Bar Association.

involves as a necessary element the transfer of possession[3] of the pledged property from the pledgor to the pledgee. It is interesting to note that, with respect to certain security transactions created under the civil law, the concept of the pledge has been so modified as to permit the retention of the pledged property by the pledgor. To the common law practitioner the use of the word "pledge" in connection with a transaction that does not involve the transfer of possession from the debtor to the creditor must appear strange indeed. However, our friends in Latin America find our use of the term "chattel mortgage" to describe a security transaction in personal property equally perplexing at first blush. Under the civil law a mortgage (*hipoteca*) may exist only with respect to realty, and to speak of a mortgage of personal property would appear as inconsistent to "civil" lawyers as the existence of a pledge without the transfer of possession seems contradictory to "common" lawyers.

The two legal systems have chosen different means of protecting the rights of a creditor while at the same time permitting the debtor the use and enjoyment of the personal property offered as security. Under our law, through the chattel mortgage we have extended the original concept of a mortgage and have thus provided the means of attaining the object mentioned above. In Latin America, and in the civil code countries generally, the institution of the pledge has been generally used for this purpose.

Agricultural Pledge

The difference in approach referred to above may best be illustrated by a transaction involving a loan to a farmer for seeds and other necessary material. Under the common law the farmer might give as security for payment a chattel mortgage on certain personal property owned by him, such as machinery, farm animals, or even growing crops. Under the civil law the farmer would "pledge" such property to the lender to secure the loan. The *prenda agraria* or one of its variants, *prenda agrícola*, *prenda rural*, or *penhor agrícola*, referring to an agricultural pledge, does not involve the transfer of the pledged property to the creditor and is in fact comparable to our chattel mortgage on certain types of farm implements. It is in this type of transaction that we find the earliest exception to the universal rule that pledged property shall be delivered to the creditor.

---

[3] It should be noted that the term "possession" is here used in its common law meaning, the civil law equivalent of which is closer to *tenencia*. The concept of *posesión* contains the additional element of an intention to keep the article for one's self. See Escriche, *Diccionario Razonado de Legislación y Jurisprudencia*, 1876, Vol. IV, p. 624; also civil code provisions, such as Código Civil de Guatemala, Art. 479.

Agricultural pledge laws in Latin America are quite similar and are typified by that of Chile[4] which provides that as security for obligations contracted in connection with agriculture, livestock raising, and similar activities, certain personal property used in connection with such activities may be pledged without the transfer of possession. The objects which may be so pledged include animals and their products; machinery and tilling instruments of all kinds and industrial equipment; seeds and crops of all kinds, harvested or growing, in their natural state or processed; and standing or cut timber.

In Chile the contract of agricultural pledge is effective between the contracting parties, and binding with respect to third parties, upon the execution of a public document (or a private one raised to this status by notarial authorization) inscribed in the special registry for agricultural pledges which is maintained by the Real Property Registry in each department. The law provides that while the debtor is entitled to the use of the pledged object, he shall be responsible for the expenses of its maintenance and may not remove it from the place where it was located at the time of making the contract, unless the creditor consents or the contract specifically so provides. The creditor has a reasonable right to inspect it at all times. The pledge certificate is transferable by endorsement thereon which must also be noted in the public registry. Endorsers remain liable for the payment of the pledge obligation.[5]

The Chilean law provides that in the event the debt should not be paid, the pledged article shall be sold at public auction if it is the type of article normally sold at such auctions. In the case of animals the sale shall be at the public fair designated by the court of the Department. In all other cases private sales may be made after an appraisal by an expert named by the court in accordance with the provisions of the Code of Civil Procedure.[6]

It should be emphasized that all of the laws permitting pledges without transfer of possession require that the pledge contract be registered in order for it to be effective against third parties, and some require this in order for it to be effective at all. Thus, registration serves to protect the creditor and takes the place of transfer of possession to him.

Most of the laws of this type provide for strict criminal penalties if the debtor should abandon the pledged property, sell, or otherwise dispose of it without the consent of the creditor.[7]

---

[4] Ley No. 4097 de 24 Septiembre 1926, Sobre Contrato de Prenda Agraria, and Ley No. 4163 de 24 Agosto 1927.

[5] *Supra*, n. 4, Ley No. 4097, Art. 7.

[6] Código de Procedimiento Civil, Arts. 507, 511, 512, 513.

[7] E.g., Argentina, Ley 9644 de 19 Octubre 1914: Prenda Agraria, Arts. 25 and 26.

Some countries have agricultural pledge laws used only in connection with agricultural property.[8] By jurisprudence and custom others have extended such laws to cover property which is not agricultural and is not used in connection with any agricultural pursuits.[9] Others have industrial pledge laws[10] and some have adopted general laws dealing with pledges of all types of property.[11]

Industrial Pledge

As indicated above, it is very difficult to adopt any arbitrary classification of the different pledge laws which exist in Latin America because in many cases agricultural pledge laws have been interpreted to cover pledges of industrial property. In expanding pledge laws to make them applicable to industrial as well as agricultural property, anomalies have crept into the laws of some countries. For example, Guatemala amended its law to permit the pledging of all personal property but apparently only pledges of personalty related to real property can be registered and thus become completely effective against third party rights.[12] It seems that a creditor who makes a loan on other types of articles is unable to place third parties on notice if there has been no delivery of the pledged article to him, because no provision has been made for the substitute requisite of registration. It would follow that if the debtor sells the property to a bona fide purchaser in good faith, the rights of the creditor would be limited to an action for damages against the debtor when the pledged property does not affect real property. It has been suggested that under such circumstances the creditor may force the third party to return the pledged object upon indemnifying the third party. Of course, the debtor may be subject to criminal sanctions.[13]

The Dominican Republic has an up-to-date agricultural and industrial pledge law.[14] Loans may be secured by pledged property not delivered to the pledgee and may be guaranteed by the pledge of property used in the

---

[8] Brazil, Código Civil, Arts. 781–804; Peru, Ley No. 2402 de 13 Diciembre 1916; Uruguay, Ley No. 5649 de 21 Marzo 1918; Panama, Ley No. 22 de 15 Febrero 1952, Sobre Prenda Agraria.

[9] Colombia, Ley No. 24 de 11 Noviembre 1921; Argentina, Ley 9644 de 19 Octubre 1914.

[10] Uruguay, Ley 8292 de 24 Septiembre 1928; Chile, Ley No. 5687 de 16 Septiembre 1935.

[11] Ecuador, Decree No. 625 de 14 Agosto 1936: Ley Sobre Contrato de Prenda Agrícola y Prenda Industrial; Cuba, Código Civil, Arts. 1863–1872, as amended by Ley No. 5 de 20 Diciembre 1950; Dominican Republic, *infra*, n. 14; Costa Rica, *infra*, n. 18.

[12] Código Civil, Arts. 769, 1125.

[13] *Ibid.*, Arts. 498, 774.

[14] Ley No. 1841 de 9 Noviembre 1948, as amended by Ley No. 3784 de 6 Marzo 1954: Ley de Préstamos con Prenda sin Desapoderamiento.

work of agriculturalists, industrialists, professional people, workers, and others. The pledged property may include crops that have been harvested or are to be harvested, animals, vehicles, ships, machinery, instruments, and other personal property used or produced in the work or profession of the pledgor. A pledge made under this law may only guarantee loans which do not exceed 60 per cent of the value of the articles given in pledge. The person who wishes to obtain a loan of this type must appear before the court with the pledgee and set forth the objects covered by the pledge, the amount of the loan, the interest, the date of termination of the agreement, and the place which the parties direct as domicile for the purposes of the pledge. The right to follow the property against third parties may be exercised by the holder of the certificate given by the court.

In 1950 Cuba amended its law to permit the making of pledge contracts without the transfer of possession.[15] The law has general application to all kinds of personal property and specifically permits the making of a pledge contract on property which is being sold by the creditor to the debtor. It is presumed that property so pledged may be used by the debtor unless the contract contains an express prohibition to the contrary.

The history of the pledge without delivery in Peru presents an interesting and somewhat typical illustration of the efforts of the commercial community to find practical legal methods of carrying out security transactions in personal property. As indicated above, Peru early adopted a traditional agricultural pledge law which has been amended and expanded, largely by the adoption of laws creating special institutions to grant agricultural credit.[16]

In addition, Peru adopted an industrial pledge law which did not specifically authorize such pledges without delivery[17] but authorized their registration. Since registration of such a contract normally makes delivery unnecessary, it would seem that the extended form of the industrial pledge has been fully recognized in Peru.

In all cases of pledges without delivery, the law of Peru provides that any unauthorized disposition of the pledged property or its removal from the place specified in the contract shall be considered a criminal offense. Since liens and encumbrances of all kinds on automobiles are recorded in the Transit Department of the Ministry of Interior and Police, an ingenious method of effecting secured loans upon automobiles has been devised. The debtor agrees to a judicial action establishing a lien which is

[15] *Supra*, n. 11.

[16] *Supra*, n. 8; Ley 6127 de 25 Julio 1929; Ley 7783 de 16 Agosto 1933; Ley 9576 de 11 Marzo 1942; Ley 11691 de 3 Enero 1952.

[17] Ley 7695 de 30 Enero 1933.

in turn inscribed in this vehicle registry to protect the creditor's interest and give notice to third parties.

Peru has under consideration by its Committee for the Reform of its Code of Commerce a draft of a general law which would permit all kinds of pledge without delivery transactions to be registered.

Comprehensive Laws

Although only two countries, Honduras and Panama, have actually used the word "mortgage" in their laws dealing with security transactions in personal property, it can be seen that with the amplification of the various pledge laws a number of countries have actually adopted laws which are as broad in their application as our chattel mortgage laws. Possibly that of Costa Rica[18] can be so classified. It governs all secured transactions in personalty except loans made by official pawnshops and warehouses, which are governed by special regulations. Among the articles listed are machines, tools, and agricultural implements. The law specifically authorizes the making of a contract of pledge with respect to an article which is the subject of a contract of sale between the same parties.[19] When the pledged property is in the form of securities, they must be transferred to the creditor.[20] In all other cases, however, the debtor may keep possession of the property in the name of the creditor, with the responsibilities of a bailee.[21] The pledge contract must be registered in the registry established for this purpose in each district. The pledge certificate which is recorded is transferable by endorsement.

In its 1950 Commercial Code Honduras completely revised its laws dealing with security transactions in personalty[22] and specifically provided that "mortgages" (*hipotecas*) may be placed on *mercantile* property. The agricultural and industrial pledge as such was eliminated from the Code and its provisions relating to agricultural pledges were replaced by new ones called *crédito de habilitación y avío* and *crédito refaccionario*. The more general application of the agricultural and industrial pledge survived in provisions to the effect that a pledge with retention of possession might be obtained on chattels which were "necessary for the development of a business or the products thereof." Conditional sales contracts were also

---

[18] Ley de Prenda No. 5 de 5 Octubre 1941, as amended by Ley No. 27 de 5 Diciembre 1941; Ley No. 800 de 5 Septiembre 1946; and Ley No. 1162 de 19 Junio 1950.

[19] Ley de Prenda No. 5 de 5 Octubre 1941, Art. 4.

[20] *Ibid.*, Art. 9.

[21] *Ibid.*, Art. 10.

[22] Código de Comercio, Arts. 916–928, 1289–1307, 1313–1317. For a resumé of the Code, see this Journal, vol. 2 (1953) 66.

authorized by the new Code, which states that a contract may provide for the reservation of title in the vendor until payment for the thing sold has been received.[23]

Under the *crédito de habilitación y avío* provisions the borrower is obligated to use the funds advanced for the payment of cultivation or manufacturing expenses inherent in the agricultural, cattle, and industrial production of the country. Such loans may be secured by the raw materials acquired with such funds and by the fruits, products, or appliances obtained with such loans, even though they may be future crops or work-in-progress. The contract of pledge must be recorded and its date fixed in order for the contract to be valid against third parties. If the debtor does not pay within the stipulated period of time (or if the period is not set, within the time fixed by judicial proceedings), the creditor may obtain a court order for the public auction of the property pledged after giving prior notice to the debtor. In special cases the public auction and notice may be dispensed with.

The new Honduran Code extends the coverage of mortgages to personalty used commercially. Business enterprises and ships may be subject to such mortgages,[24] and a mortgage covering a business enterprise shall include in its scope all the elements thereof without the necessity of a detailed description.

The provisions in the new Code of Honduras relating to *crédito de habilitación y avío* and *crédito refaccionario* are very similar to those found in the law of Mexico.[25] Under the latter type of credit the creditor has the additional right to request the appointment of an interventor who may assume control of the debtor's business if it can be shown that the funds loaned are not being used for the purpose agreed upon in the loan agreement. This allows close control over the use of the credit funds, and although intervention may never take place, the existence of the right may be effective to secure compliance by the debtor of his obligations.

Upon default of a *crédito refaccionario* the creditor may immediately attach the pledged property and subject it to judicial auction for the amount owed him. A deficiency judgment is also permissible. In bankruptcy the creditor holding this type of security has preference over all claims except government claims or liens for personal services.

Very comprehensive legislation with respect to security transactions

---

[23] *Ibid.*, Art. 781.

[24] The reader will have noted that no attempt is made here to treat marine security transactions, the law of which is substantially the same in both great systems of law.

[25] Ley General de Títulos y Operaciones de Crédito, Arts. 321–333.

was recently enacted by Panama.[26] The use of the word *hipoteca* in the title of this new law demonstrates the strong influence that the common law has on the law of Panama. The law states that it extends the ambit of real property mortgages to personal property which is specifically identifiable and capable of a sufficiently precise description in the Public Registry to locate it at all times.

The Civil Code of Panama[27] itself was amended to provide that all mortgages of such personal property may be recorded. It is most interesting that under the new law such a mortgage constitutes a real right (*derecho real*) in property in favor of the mortgagee (*acreedor hipotecario*) as a guarantee of the completion of a determined obligation. The mortgaged property may not be removed from the municipality in which it was located at the time the mortgage agreement was made, except with the permission of the mortgagee. An exception to the above is made in the case of rolling stock, which may be transferred from one district or province to another on condition that it not be permanently located there. The debtor may not sell, convey, or in any way encumber the mortgaged property either in whole or in part. The mortgage contract must be registered in the Property Registry in order for it to be effective against third parties. It is not even effective between the contracting parties unless recorded. The mortgagor who has mortgaged property in his possession must use it without damaging it and is obliged to conserve and maintain it in perfect condition. The mortgaged property must be free of all other encumbrances. If a mortgage is given upon property which is subject to a prior encumbrance, the contract cannot be inscribed in the Registry and, as an illegal contract, is deemed a nullity. The law describes penal sanctions for those who in bad faith fail to disclose the true ownership of mortgaged goods. A debtor who abandons mortgaged goods to the damage of the creditor may be sentenced to from six months' to two years' imprisonment.

Personal property which is attached to mortgaged real property cannot be the subject of a mortgage, and mortgaged personal property which becomes attached to real property cannot be the subject of a real property mortgage. Personal property mortgages may be transferred by endorsement. If the mortgage debtor makes payment before the time fixed in the contract, with interest to the date of payment originally specified therein, the debtor may compel the creditor to cancel the mortgage in the Registry.

[26] Ley No. 21 de 15 Febrero 1952, Sobre Hipoteca de Bienes Muebles. For a brief comment on this law and the Conditonal Sales Law, see this Journal, Vol. 2 (1953) 71. (This law has been modified and clarified by Decreto-Ley No. 16 de Septiembre 1954.)

[27] Art. 1567.

As noted above, agricultural pledges have been authorized in Argentina since 1914.[28] A recent pledge law[29] has extended the scope of the early law to permit the pledging of all articles of personal property.[30] It is to be noted, however, that while under the old law any individual, whether a merchant or not, could be a creditor provided the security was one listed in the law, under the new law restrictions are placed upon who may be creditors. Only the following may qualify as creditors: (a) the government and official banks; (b) co-operative societies and agricultural, livestock, and industrial societies; (c) agricultural storage centers (for credits given for agricultural exploitation); (d) merchants inscribed in the Public Registry of Commerce (but only for the purpose of assuring payment for merchandise sold by them upon which a pledge is made); and (e) those persons registered as lenders in the Office of Internal Revenue, provided that interest charged by them shall not exceed by more than 2 per cent that charged by the Bank of Argentina for its personal loans.

Thus the new Argentine law broadens the types of property which may be given as security but limits the class of those who may make such loans. It would appear that, in an effort to prevent abuse by those who might charge excessive rates of interest, the drafters of the law have severely restricted its application.

With respect to corporations, in practice a study of the corporate charter (*Estatutos*) is made by the Registry to determine whether the transaction is one within the corporate purposes. Except for the above restrictions on those who may qualify under the law, it is broad in scope and affords the creditor security similar to that obtained by him through a mortgage on real property. The law provides for the registration of such contracts in the Pledge Registry. Registration is effective against third parties as of the time of making the contract if the contract is registered within twenty-four hours. If not so registered, it takes effect against third parties from the time when it is actually registered.

The law introduces for the first time a floating pledge (*prenda flotante*) upon personal property in the form of a pledge upon the general merchandise of a commercial establishment.[31] This type of pledge is limited in time to six months. Articles resulting from the transformation of those originally pledged and those which have been acquired to replace them

---

[28] *Supra*, n. 7.

[29] Ley de Prenda No. 12962 de 27 Marzo 1947, ratifying Decreto No. 15348/946 published in Boletín Oficial No. 15511 de 25 Junio 1946.

[30] *Ibid.*, Art. 10.

[31] *Ibid.*, Arts. 14–16.

are subject to the floating pledge. However, all such articles may be sold in the normal course of business of the particular establishment.

The general pledge law provides severe penalties for its violation by debtors or creditors.[32]

Conditional Sales Laws

Strictly speaking, a conditional sale of personal property does not involve a security transaction, since the vendor simply retains title to the property until the full purchase price has been paid. The term is well understood in the United States to mean this type of transaction. It is not always thus understood in Latin American countries because of the fact that the civil law has a well developed body of conditional contract law not primarily related to sales. In addition, the basic difference in the civil and common law in the meaning of "title" as it refers to personalty further complicates any discussion of the subject. The fact that the "common" lawyer frequently thinks of a conditional sale as a secured transaction in personal property indicates that in fact even in the common law possession is a large element of title to personalty.

Since under the civil law individuals enjoy the widest latitude in making contracts, there is little question but that a conditional sale contract involving personalty is valid between the parties. Because possession in the civil law is the greater part of title to personalty,[33] the seller maintaining title but not in possession finds himself in a very poor position with respect to the rights of third parties.

A review of Latin-American legislation on the subject indicates that almost half of the countries have laws authorizing conditional sales which provide for registration to protect the rights of the conditional seller against third parties. Among those countries having a conditional sales law with provision for registration of the sales contract for the purpose of putting third parties on notice are Brazil,[34] Chile,[35] Costa Rica,[36] the Dominican Republic,[37] Honduras,[38] Mexico,[39] Panama,[40] and Peru.[41]

In Brazil a contract for the sale of goods, of a civil or commercial

[32] *Ibid.*, Arts. 44–45.
[33] E.g., Venezuela, Código Civil, Art. 794.
[34] Decreto-Lei No. 1027 de 2 Janeiro 1939.
[35] Ley No. 4702 de 3 Diciembre 1929, Ley Sobre Compraventas de Cosas Muebles a Plazo.
[36] Ley de Prenda No. 5 de 5 Octubre 1941.
[37] Ley 1608 de 29 Diciembre 1947.
[38] Código de Comercio, Art. 781.
[39] Código Civil, Art. 2312.
[40] Ley 21 de 15 Febrero 1952.
[41] Ley No. 6565 de 12 Mayo 1929, Fiscalización de Ventas a Plazos.

nature, containing a clause reserving ownership must be inscribed, in whole or in part, in the Public Registry of Certificates and Documents where the buyer is domiciled, in order to be valid against third parties. The regulations for transit service in the Federal District contain additional special provisions for conditional sales of automobiles.[42] Within three days after the sale of any motor vehicle the transfer to the new owner must be recorded in the registry of the transit service, and in the case of a sale with reservation of ownership, the seller is required to register the contract.[43]

General laws defining crimes against the popular economy[44] include among such crimes the violation by the creditor of a conditional sale contract by the failure to deliver the articles sold, or in the event of the rescission of the contract, by the failure to return the installments paid or withholding an amount greater than the depreciation of the article.[45]

The Chilean law[46] authorizes the conditional sale of a great variety of articles including automobiles, pianos, books, watches, sewing machines, refrigerators, and home and office equipment. The conditional sale contract must be in the form of a public instrument or a private instrument certified by a notary or a registered official in those places where there are no notaries. The contract must be registered in the Special Registry of Pledges (*Registro Especial de Prendas*) in the Department where the contract was made. The contract must state that the article has been delivered to the purchaser and must also name the place where the article will ordinarily be found.

In 1947 the Dominican Republic enacted one of the most complete conditional sales laws in Latin America.[47] It provides that ownership under a contract for the conditional sale of personal property is not acquired until the whole or a determined portion of the price is paid. It established a Central Registry of Conditional Sales of Personal Property (*Registro Central de Ventas Condicionales de Muebles*) in the Office of the Director of the Registry in the district of Santo Domingo. The conditional sale contract must be registered within thirty days after it is made, either directly or through the local Registry Director. Once registered, the conditional sale contract may be transferred by endorsement and is effective against third parties. The owner may recover the article from

---

[42] Decreto No. 20483 de 24 Janeiro 1946.
[43] *Ibid.*, Art. 47.
[44] Decreto-Lei No. 869 de 18 Novembro 1938, and Lei No. 1521 de 26 Dezembro 1951.
[45] *Ibid.*, Art. 3 IV of 1938 law, and Art. 2 X of 1951 law.
[46] *Supra*, n. 35.
[47] *Supra*, n. 37.

third persons in the same manner as he could recover it from the purchaser.[48] Upon failure of the purchaser to make one or more payments when due, the seller may give ten days' notice of his intention to recover the property, which can be carried out by means of summary proceedings.[49] It is deemed abuse of confidence subject to penal sanction for the conditional vendee to transfer, destroy, or hide the property sold.

In Honduras installment sales contracts are authorized by the new Code,[50] which provides that where property is sold with the price to be paid in installments, the contract of sale may contain a clause to the effect that such contract shall be null and void if default is made in the payment of any of the installments, subject to the following qualifications: (a) in the case of real property, or personal property such as automobiles, motors, pianos, sewing machines, and other products which can be specifically identified, the rescission of the contract shall be valid against third parties acquiring such property only if the rescission has been recorded in the Public Registry of Commerce, and (b) in the case of personal property which cannot be specifically identified, the rescission of the contract shall not be valid against third parties acquiring such property in good faith.[51]

Installment and conditional sales of articles capable of precise identification are permitted under the laws of Mexico.[52] The code lists the following as articles of the type which may be sold under such a contract: automobiles, pianos, and sewing machines. Upon failure to pay one or more installments such contracts may be terminated and termination shall be effective against third parties when recorded in the Public Registry.

Panama's chattel mortgage law applies to conditional sales of personal property.[53] A conditional sale contract shall be made in the form of a private document signed by the contracting parties. It must be presented to the District Secretary where the parties reside for approval and annotation, and the Secretary of the district of the buyer must be notified in case the buyer and seller live in different localities. Unless conditional sales contracts are inscribed in a Public Registry, they have no effect against third parties and the purchaser of the property remains liable only in civil debt.[54] The vendor is given preference in payment over all

---

[48] *Ibid.*, Art. 10.
[49] *Ibid.*, Art. 12.
[50] *Supra*, n. 38.
[51] *Ibid.*, Art. 779.
[52] Código Civil, Arts. 2310, 2312.
[53] *Supra*, n. 40, Art. 19.
[54] *Ibid.*, Arts. 20, 21.

other creditors and alone has the right to follow the property wherever it may be found. He is given preference in the proceeds of the public sale to the extent of the debt.

A new section was established in the Office of Public Registry for the purpose of recording contracts concerning present and future crops and personal property which may be specifically determined. With respect to conditional sales, after they have been noted by the District Secretary, they shall be inscribed in the Public Registry within a period of fifteen days after their making. The maximum period of duration, for mortgages of personalty as well as conditional sales, is two years. In case of the death of the debtor, the creditor shall have the right to request that a third person be constituted depository of the mortgaged property.[55]

Peru was one of the first countries to adopt a conditional sales law. Personal property which has a serial number or can be specifically identified may be the subject of such a sale. These contracts are registered in the *Registro Fiscal de Ventas a Plazos*, and it is noteworthy that at this early date (1929) Peru treated leases of personalty with an automatic option to purchase as sales which should be recorded in this particular registry.[56]

In the absence of a specific law governing installment sales, it is necessary to consider the provisions of the civil and commercial codes of a country to determine whether such sales are valid. In most countries a clause reserving ownership in the seller until final payment has been made would permit the recovery of the property from the purchaser. However, in view of the importance of possession under the civil law, the seller may generally not recover the articles from third party purchasers in good faith. It follows that only where this type of contract can be registered does it offer the seller good protection.

Lease with Option to Purchase

Notwithstanding the fact that during recent years various countries of Latin America have adopted conditional sales laws and otherwise strengthened and clarified their laws dealing with security transactions in personal property, much personal property is still "sold" under lease with option to purchase contracts. This type of contract was largely developed and used by United States companies which pioneered in the installment sales field in Latin America. With the recent general improvement in the purchasing power of a large number of people in Latin America, increasing quantities of consumer goods, such as automobiles,

---

[55] *Ibid.*, Art. 30.

[56] *Supra*, n. 41.

furniture, refrigerators, vacuum cleaners, radios, television sets, air conditioning units, etc., are being sold. Many vendors have had the unhappy experience of finding that their usual conditional sales contracts are ineffective, that they have no right to repossess the merchandise sold, and that frequently a third party purchaser gets full and complete title. In many countries the purchaser under such a contract is free to sell the property to a third party and remain liable only in a civil action for collection of the amount called for under the contract.

To secure full recognition by the courts of the lease with option to purchase contract it is essential that the contract be exactly what the name implies and no more. It must be a bona fide lease entitling the lessee to the use and possession of the merchandise. The option to purchase must be carefully drawn and should not be automatic. The option to apply the rent on the purchase price must lie exclusively with the lessee. The lease contract should provide that the lessor is entitled to recover the property and should not give him an option to recover either the balance of the lease payments or the property.

It should be stressed that in many cases where the above admonitions were not strictly followed the courts have deemed such contracts simulated sales, with the result that the security interest of the vendor has been destroyed.[67] This form of arrangement is still very popular, however, and when properly drawn serves to permit a wide variety of transactions not expressly authorized by the codes. One of the principal advantages is that the lessee can be held criminally liable if he transfers the property which is in his possession by virtue of a recorded lease.

Conclusion

Most of the countries in Latin America have recognized the usefulness of installment sales either by the adoption of specific laws dealing with them or by the acceptance of some such transaction as the lease with option to purchase. However, they are also zealous in their protection of the purchaser, and it is apparent that a few of them are reluctant to adopt laws to facilitate sales of this kind because of some concern that they are inherently open to abuses, such as usury, summary forfeiture of rights after payment of most of the purchase price, etc. It is submitted that installment sales and security transactions in personalty serve useful purposes and that proper legal safeguards against abuse can be set up.

[67] A good discussion of cases to this effect and contrariwise is included in Fernández, Raymundo L., *Código de Comercio de la República Argentina Comentado*, Edición 1950, Tomo II, Arts. 450 a 579.

The civil and common law have taken different paths to develop practical legal methods of carrying out security transactions in personal property. The more progressive jurisdictions using each great system of law have arrived at almost the same state of development. Possibly the common law can borrow further from the emphasis of the civil law on registration as a means of protecting third parties and creditors, and more common law concepts of ownership can be grafted onto the civil law to aid in the development of even more efficient legal tools in this field.

RUDOLF B. SCHLESINGER

Teaching Comparative Law: The Reaction of the Customer

I

THE POLITICAL UPHEAVALS OF THE PAST DECADES and the resulting migrations, coupled with the general quickening in the tempo of interchange of persons, goods, and ideas, have accentuated the need for lawyers trained in more than one legal system. The same factors have created a favorable atmosphere for the teaching of comparative law. Sometimes by choice and sometimes by compulsion, thousands of able lawyers have changed their habitat; in new surroundings, they find themselves tempted and often forced to master several legal systems. Many capable teachers of comparative law have been drawn from this group.

In response to these conditions, law faculties and law schools everywhere have adopted new courses and expanded their teaching in the area roughly described as comparative law.[1] They were aided in this by a profusion of valuable new literature on the subject, and by the work of old and new institutes and organizations devoted to the study of comparative law.

II

In spite of this growing display of high-class merchandise, it is reported by every sober observer that the customers stay home. Classes attending comparative law courses remain small.[2] There are exceptions, but they are too few to change the over-all picture.[3]

RUDOLF B. SCHLESINGER is Professor of Law, Cornell University, Ithaca, New York.

[1] See Report of Committee on Comparative Civil Procedure and Practice, 1951 Proceedings of the Section of International and Comparative Law of the American Bar Association, pp. 90 *et seq.*; Re, "Comparative Law Courses in the Law School Curriculum," 1 Am. J. Comp. L. (1952) 233; Aubin-Zweigert, Rechtsvergleichender Hochschulunterricht in Deutschland (1952).

[2] See Ehrenzweig, "The Teaching of Jurisprudence in the United States," 4 Journal of Legal Education (1951) 117, 118–9, n. 6.

[3] *Ibid.*

It has been suggested that the difficulty can be overcome by developing some or all of the "bread-and-butter" courses on a really comparative scale. This method is feasible and necessary, and has become standard practice, in countries having a mixed legal system, such as

What is the reason for this sad state of affairs?

It is true, of course, that in most instances courses in comparative law are not compulsory. This is the way it should be. One possible motivation for the study of comparative law is thus eliminated.

It is true, furthermore, that in most countries a young man may become a full-fledged member of the legal profession without ever taking an examination on the subject of comparative law, and indeed without ever taking an examination probing into the depth of his legal understanding to such an extent that a knowledge of comparative law would help him pass the particular examination. This, perhaps, is not the way it should be, and the ministries and commissions who determine the contents of bar examinations or other state examinations for lawyers, should be educated on this point. For the time being, however, the fact remains that neither direct academic compulsion nor the indirect compulsion of an ultimate state examination leads the fledgling lawyer toward comparative law.

These external factors, however, do not explain the magnitude of our failure. Other subjects which are taught in many faculties and schools, have attained popularity and educational success without the students being whipped into the lecture hall by compulsion. Why is it that law students, young people often aware of the interdependence of all countries and of their own future responsibilities as national and international leaders, stay away from an educational opportunity such as is offered by comparative law? This is a strange kind of intellectual market place. The merchandise offered is of the highest quality. There are many who would derive enjoyment and profit from using that merchandise, but none will buy. The explanation, I submit, lies in a complete failure of salesmanship, or, if we leave the parable and return to our subject—in poor teaching.

We are thus faced with an educational problem which is rather fundamental. What distinguishes good teaching from poor teaching? Why is A a better teacher than B?

Egypt or Israel. For similar reasons, the method has been introduced in Louisiana. See F.F. Stone, "On the Teaching of Law Comparatively," 22 Tulane Law Review (1947) 158. In other jurisdictions, however, where this particular condition does not exist, it might be wasteful and indeed impossible (unless every faculty member becomes a comparatist) to teach a large number of courses in this way. If the use of the method is limited to one or two courses, on the other hand, it is apt to be inadequate. American students, for instance, who have not had a separate comparative law course explaining the basic methodological and terminological differences between common law and civil law, are not likely to derive much benefit from some civil law materials strewn into a course on, say, bills and notes. Experience shows, moreover, that such incidental comparative materials are always the first to fall by the wayside when the instructor begins to feel the pressing necessity of "covering the ground" in a bread-and-butter course.

The answer is, in part, shrouded in the mysteries of the response of one personality to another, and in the old adage that teachers are born, not made. Perhaps A is a born teacher and B is not. But this, I earnestly submit, is only part of the answer. The other, and equally important, part of the answer is that A responds to the demands and needs of his students, while B, perhaps, rides the hobbyhorse of his own research interests.

It may well be that B has as clear and valid a conception as his colleague A of what the students *should learn*; but if he has to lecture to an empty hall, his teaching will serve no purpose in spite of the loftiest postulates. Therefore, the question of what the students should learn is not the only important question. If psychology has taught us anything it is not to disregard the problem of motivation, including the problem of what the students *want to learn*. The degree to which a teacher should be guided by the latter consideration will depend on many factors, above all on the maturity of his students. An instructor who teaches a class of ten-year-old boys will hardly give in to their desire to substitute boxing for arithmetic. Moreover, among youngsters attending elementary school or any other school on the precollege level, there will, as a rule, be such diversity of taste and preference that it is almost impossible to determine what the class as a group want to learn.

On the college level (using the word "college" in its American sense) the problem is recognized as a crucial and difficult one; it is usually met by varying mixtures of compulsory courses and of electives. The "electives" are permitted to wither unless they stand the test of the market place.

Professional education is characterized by two salient facts. First, the student has previously obtained a document certifying that he has mastered all of the general education necessary for entrance into the profession. Second, the whole course of instruction of the professional school is an "elective," in the sense that the student has chosen it after the basic and compulsory needs of his general education have been satisfied (at least in his opinion, which is fortified by a *baccalauréat, Reifezeugnis*, B.A. degree or similar document). Before the student entering a professional school attends his first lecture, *he* has determined, at least in terms of general direction, the purposes and contents of his further education.

The student who has chosen the law as his profession may still have to accept some dictation as to the courses which are necessary if he wishes to reach his goal. He will submit to such dictation to the extent, but only to the extent, that the compulsion is reasonably responsive to the exigencies of the professional life which awaits him beyond his graduation.

Similarly, when they are given freedom to elect courses and activities, most law students, like other professional students, will seek knowledge

not for its own sake but for a specific purpose which, however broadly, is defined by the entrance requirements and the objectives of the profession of which they wish to become members.

III

The great majority of regular law students in most countries will continue to neglect comparative law unless the subject is taught in such a manner that it contributes to the body of knowledge and skills which the students will put to actual use in their later careers as attorneys, judges, legislators, government officials, and business advisers.

That there is much within the almost boundless area of "comparative law" which can be so used, is no longer open to question.[4] Whether, seen from this pragmatic angle, it is more profitable to study the legal system of country X or of country Y, and whether illustrations should be chosen from the field of decedents' estates, corporation law, taxation, or sales—those are questions which will call for different answers, depending on the time when, and the place where, the course or courses are to be taught.[5] Assuming a wise choice is made as to countries, types of materials, and illustrative subjects, there can be no doubt that a comparative law course can offer much practical help to the student who prepares himself to handle cases and negotiations having international aspects,[6] and even to the student who, for purposes of a purely domestic practice, seeks to arm himself with deeper understanding and fresh arguments.[7]

Comparative law, thus, can be of practical value to the lawyer or future lawyer—of enough practical value to attract him to the subject. But there is an *if*. Comparative law can be of practical educational value only if it is presented in such a way that its value becomes *apparent* to the student, that is, sufficiently apparent to create the necessary motivation.

---

[4] See, e.g., Arminjon–Nolde–Wolff, Traité de Droit Comparé, Vol. I, (1950) 18 *et seq.*; David, Traité Elémentaire de Droit Civil Comparé, (1950) 37 ff.; Schlesinger, Comparative Law—Cases and Materials, (1950) x–xi, 8 ff.

[5] From the standpoint of the American law teacher, I have treated this point a little more elaborately, *op. cit.* n. 4 *supra*, at pp. xii *et seq.*

Whether there should be one or more comparative law courses, depends on available manpower and general curricular objectives. This question is outside the scope of the present paper. What is said here, however, is thought (subject to the qualifications stated in ns. 19 and 26 *infra*) to apply to every comparative law course, whether it is offered as the only such course in the curriculum or as one of a group of related courses.

[6] In addition to the authorities cited in n. 4 *supra*, see Moses, "International Legal Practice," (1935) 4 Fordham L. Rev. 244.

[7] See, e.g., John Wolff, "The Utility of Foreign Law to the Practicing Lawyer," (1941) 27 A.B.A.J. 253; Re, *loc. cit.* n. 1, *supra*.

IV

At this point, I can hear the anguished outcries of some of my colleagues. "A traitor to science," they will exclaim, "a deserter from scholarship." And my European friends, to be sure to exclude me from all respectable circles, may even call me a pragmatist.

Here is my defense.

Has the chemist, the engineer, or the medical man ever been called unscientific because his research and his teaching are directed toward practical ends? In teaching and studying, it is not the end but the method which determines the scholarly nature of the undertaking. One who studies nutrition in a scientific way is a scholar; but one who explores the ancient culture of the Incas by unsystematic and fumbling methods, is not.

It is my earnest contention, therefore, that the scholarly level of our teaching will not be depressed by an open avowal and promotion of the practical ends which are necessarily pursued by future as well as present members of our great profession.

Nor is the pursuit of practical goals inconsistent with the postulate that the teaching of comparative law be a road toward deeper insight into the nature, the history, and the socio-political implications of law. One example, probably not as good as many others which may occur to the reader, will illustrate the point: In the 30-hour course on comparative law which I projected, I devoted almost one-fourth of the materials to the difficult and much neglected but highly practical subject of pleading and proof of foreign law.[8] Somewhere in this context, a procedural problem arises: in what way can the court arrive at a decision if it refuses to take judicial notice of the pertinent foreign law and if the plaintiff (or the defendant, as the case may be) has failed to plead and prove such law?[9] As every practitioner knows, this is an important problem which has led to conflicting answers even within one and the same jurisdiction.[10]

---

[8] Schlesinger, Comparative Law—Cases and Materials, (1950) 32–139.

[9] Regardless whether foreign law be treated as "law" or as a "fact," this question has turned out to be a hard nut to crack for civil law as well as common law courts. For a comparative discussion of this point, see W. Niederer, Einführung in die allgemeinen Lehren des internationalen Privatrechts, (1954) 344–350, where a wealth of further references can be found. See also Nussbaum, "The Problem of Proving Foreign Law," 50 Yale L.J. (1941) 1018; Nussbaum, "Proving the Law of Foreign Countries," 3 Am. J. Comp. L. (1954) 60; Sommerich and Busch, "The Expert Witness and the Proof of Foreign Law," 38 Cornell L. Q. (1953) 125; Note, 37 Cornell L. Q. (1952) 748.

[10] This is especially true in New York. The tortuous course of the older New York cases is traced in Arams v. Arams, 182 Misc. 328, 45 N.Y.S. 2d 251 (Sup. Ct., N.Y.Co., 1943). More

Some of the American cases which American students might profitably study in this connection have established a presumption that "all countries, in their courts of justice, will give effect to universally recognized fundamental principles of right and wrong in deciding between contending parties."[11] The burden of proof as to the foreign law, and the actual determination of many a case, thus will depend on whether "the complaint alleges facts which fairly may be assumed to create an obligation under the law of any civilized country."[12] Technically, the problem at hand deals with the burden of proof in a particular situation[13]—a narrow practical problem. But, before we can lay it aside, we have to wrestle with questions of real depth: Are there any principles which are "universally recognized" among civilized nations? Can we treat a principle as "universally recognized" although it is at variance with the rules or the actual practice of some countries? Was Mr. Justice Holmes right in assuming that such universally recognized principles exist only with respect to "rudimentary contracts or torts . . . , such as promises to pay money for goods or services, or battery of the person or conversion of goods"?[14] In what way should the court inform itself before it proceeds to answer the question whether a given principle, well established in its own municipal

---

recent conflicts among lower court decisions were straightened out by the Court of Appeals in Pfleuger v. Pfleuger, 304 N.Y. 148, 106 N.E. 2d 495 (1952) and Wagner v. Derecktor, 306 N.Y. 386, 118 N.E. 2d 570 (1954). See also, in addition to the authorities cited in n. 9 *supra*, Stiefel and Wengler, "Neuere amerikanische Gerichtsentscheidungen," NJW 1952, 1404; Schlesinger, "Neuere amerikanische Gerichtsentscheidungen," NJW 1954, 828.

[11] Parrot v. Mexican Central Railway Co., 207 Mass. 184, 93 N.E. 590 (1911). The presumption is a rebuttable one.

[12] This quotation is from the opinion in the Arams case, *supra* n. 10.

[13] That the problem is one of burden of proof, becomes apparent in a number of cases such as Riley v. Pierce Oil Corp., 245 N.Y. 152, 152 N.E. 647 (1927); Industrial Export & Import Corp. v. Hongkong & Shanghai Banking Corp., 302 N.Y. 342, 98 N.E. 2d 466 (1951); Gerli & Co. Inc. v. Cunard S.S. Co. Ltd., 48 F. 2d 115 (C.C.A. 2, 1931). See also the brief but enlightening discussion in Ehag Eisenbahnwerte Holding Aktiengesellschaft v. Banca Nationala A Romaniei, 306 N.Y. 242, 117 N.E. 2d 346 (1954), where in footn. 2 the court gives an interesting collection of cases in which the burden was shifted or possibly affected by the application of the doctrine relating to universal principles.

Even those courts and writers (mostly in civil law countries) who do not think that technically the problem is one of burden of proof, recognize that a party who supports a contention by invoking a rule of foreign law, has a "natural evidentiary interest" in establishing such rule, for the simple reason that in case of its nonestablishment the court may either reject the contention as unproved, or judge it by the (probably less favorable) rules of domestic law or of another body of law held to be applicable. See 1 Stein–Jonas–Schoenke, Kommentar zur Zivilprozessordnung, 18th ed., Section 293, Anno. IV 2 (1953), and authorities there cited.

[14] Cuba Railroad Company v. Crosby, 222 U.S. 473, 32 S.Ct. 132 (1912).

law, is really "universal"?[15] If any universal principles can be found, can they be established with sufficient definiteness (as to remedy as well as basis of liability) so that the facts alleged in a concrete complaint may be assumed to create, in every civilized country, the very obligation which corresponds to plaintiff's prayer for relief?[16] In addition, a teacher may well raise the question whether in historical perspective we are moving toward more universality, or away from it.[17] Nor should he miss the opportunity for showing, right at this point, that the comparative method is a necessary tool in the development of international law, which depends for one of its sources on "the general principles of law accepted by civilized nations."[18]

It is true, of course, that the interplay of law, sociology, anthropology, psychology, philosophy, religion, history, and politics which is involved in these questions, can be conjured up before the student's eyes without the pretext of a technical point of procedure. But experience shows that the technical point, i.e., the point which may come to plague the student in a couple of years when he himself will have to draw real-life complaints,

---

[15] In practice the courts simply guess as to what constitutes a universally recognized principle. See the Arams case, *supra* n. 10. Such a guess may be uninformed (as in the Cuba Railroad case, *supra* n. 14, where the Court overlooked that assumption of risk is usually treated as an affirmative defense, to be proved by the defendant), or it may be sophisticated (as in the Gerli case, *supra* n. 13). The court's own domestic law is apt to be the starting point for the guess. See the reference, in the Ehag case, *supra* n. 13, to "the pertinent principles of our own internal law," which language is followed by citations of cases applying the universal principle doctrine.

The courts can hardly be blamed for their ignorance in this respect. They have received little help from the comparatists. To remedy this situation, the Bureau of the International Committee of Comparative Law at its Copenhagen meeting in May 1953 recommended the organization, under the auspices of UNESCO, of a Congress of Comparative Law to be held in 1956 to consider the topic: "General principles of law recognized by civilized nations." See A. Coudert's report on that meeting, 3 Am. J. Comp. L. (1954) 140, 141.

[16] One may, perhaps, assume the existence of a more or less universal principle that written contracts among merchants create obligations "generally measured by the language used." See the Gerli case, *supra* n. 13. But as to the remedy for the breach of such a contract, no universal rule exists. In some countries an action for damages will be the ordinary remedy, while elsewhere the normal course for the aggrieved party will be to make the defaulter perform. See Schlesinger, Comparative Law—Cases and Materials, (1950) 117, 262–3. That being so, can we assert a universal principle that the contract breaker is liable in damages, or that a court will compel him to render specific performance?

[17] A discussion of unification, a traditional topic of comparative law, would be relevant at this point. But the over-all problem goes far beyond unification in the narrow sense of adoption of unified or uniform statutes. Enactment of identical written texts is neither necessary nor sufficient to make people think and act alike. Broad trends in politics, legislation, legal scholarship, judical decisions, and governmental and business practice have to be discerned if the question posed in the text is to be approached in a realistic spirit.

[18] Art. 38 of the Statute of the International Court of Justice.

greatly enhances his interest. The reason for this may be that he can thus identify himself with one of the actors in the legal drama; and this process of identification is as important in the lecture hall as it is in the theatre.

V

Having argued the case for the necessity of practical motivation in teaching comparative law, and having, I hope, demonstrated that such motivation does not detract from the scholarly depth of penetration, I should like, in conclusion, to mention some of the *classroom techniques* by which such motivation can be induced.[19]

1. The total area of what can be described as "comparative law" is boundless, and everyone planning a course of such description is faced with a threshold problem of selection. He must choose, geographically and historically, the legal system or systems to be studied. He must choose illustrative subjects and types of materials. I submit that in making such choice he will do well to select problems which are likely to come up in the private or governmental work of lawyers practicing in the students' country.

2. Even if the instructor knows that the problems he presents are likely to occur in the students' later practice, it cannot be presupposed that such knowledge is shared by the students. This knowledge, so basic to their motivation, must be driven home to them as early in the course as possible. As law students are educated to be skeptical, the instructor's ipse dixit will not suffice. Real-life illustrations, whether taken from reported cases[20] or from other sources, will be more convincing.

3. Lectures or case method? My answer to this question, embodied in my own "Cases and Materials,"[21] was in favor of cases, although with a generous admixture of translated code sections, other statutes, quotations from text writers, and text notes of my own. The large majority of

---

[19] The remarks which follow in the text should be qualified by saying that they do not apply to comparative law courses offered in a social science curriculum, essentially as part of an area program or of some other comparative study of cultures. Many of these courses (e.g., some of the seminars on Soviet law conducted in American universities) are of a high order, and this writer is on record as recognizing their value. See Book Review, 38 Cornell L. Q. (1952) 109. But courses of this kind are not treated in the present paper, which deals with the teaching of comparative law in only one aspect, namely, as part of the professional training of lawyers.

[20] In this respect, the teacher of comparative law is helped by such massive collections as Dr. Domke's Digest of Foreign Law Cases which appears in every issue of the American Journal of Comparative Law, and the Supplements ("Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts," edited by Dr. Makarov) published by the Zeitschrift für ausländisches und internationales Privatrecht.

[21] See n. 8 *supra*.

29 reviewers approved the method, at least in principle. I was much impressed, however, by the reservations which some thoughtful European reviewers voiced with respect to the use of the case method in teaching comparative law.[22] On theoretical grounds, their arguments are forceful.[23] But I think it is fair to say, on the other hand, that most civilians who attended case-method courses on comparative law in the United States, went away convinced that the method works, and that even in terms of systematic coverage American students gain as much by the use of this method as they would from an equal number of lectures supported by the reading of a textbook.

With American students, the case method works because they are accustomed to it, and trained in its use. For the same reason, the lecture-textbook method, supplemented by seminars, continues to produce fine lawyers in most other countries. This is not the place to strike another blow in the never-ending dispute whether *in general* one or the other method, or one of the countless combinations thereof, should be preferred. By the time a student takes up *comparative law*, which is always an upper-class or graduate course, his study habits are apt to be established. Since the subject itself is foreign and unfamiliar, it seems particularly important not to increase the beginner's discomfort by introducing, at the same time, an unfamiliar method of teaching. I submit, therefore, that there are strong educational reasons for using the method in which the students are generally trained, that is, a modernized casebook method[24] in North America, and the lecture-textbook method, with whatever enlivening features have been added recently, in most other countries.

4. Comparative law involves comparison, usually with the student's own legal system. Depending on the precise stage of his studies which he has reached, the student will have mastered some parts of his domestic curriculum more completely than others. Even if he takes a comparative

---

[22] See Book reviews by A. Tunc, Revue Internationale de Droit Comparé 1950, 802 and by K. Zweigert, 17 Zeitschrift für ausländisches und internationales Privatrecht (1952) 397, 404 *et seq.*

[23] Considerations of space prevent me from discussing these arguments here; but this self-limitation is intended to be "without prejudice."

[24] Practically all editors of recent American casebooks have made use of textual materials, whether quoted from other authors or written by the editors themselves. The "casebook" thus does not exclude text materials; it merely changes their arrangement and, in varying degrees, may reduce their importance in the learning process because in the students' minds the cases will stand out as the principal landmarks.

By the same token, the modern case method no longer confines work in the classroom to the dissection of cases. While the cases are still considered useful as the best vehicle for stimulating active student participation, they do not preclude such doses of systematic lectures as the instructor thinks necessary.

law course on the post-graduate level,[25] he may not be familiar with more or less specialized subjects such as labor law, trade marks, or copyright. Therefore, unless the course is given for specialists who know their special field at least in its domestic aspects, it seems advisable to choose illustrative subjects with which the nonspecialist, at the students' particular level of legal education, may be expected to be familiar.

The instructor, moreover, should at each turn attempt to weave the contents of the comparative law course together with what the student has learned in his other prelegal or legal courses. Without such connecting link, which ties comparative law to the student's general and legal experience, the presentation of a foreign legal system will strike the student as abstract and bizarre.

5. Any method of teaching, in the end, is as good as the teacher who uses it. Of the qualities which should be required of a teacher of comparative law, some are obvious, such as the requirement of complete mastery of the legal system in which his students have been brought up. Not quite so obvious, perhaps, but highly important, is the postulate that his activities should not be permanently limited to comparative law, even though his research and writing be so confined. Only an instructor who also teaches "bread and butter" courses, or practices "bread and butter" law, will have sufficient contact with the general body of lawyers and law students in his country to know their interests and working habits and to be familiar with the range of their knowledge of their own law. If he lacks that familiarity, his teaching will betray him as a dweller of the ivory tower.[26]

These five tricks of the trade, which seem to have worked well in the classrooms where they were employed, but for which no claim is made either of exhaustiveness or of earth-shaking originality, are set forth in the hope of provoking further discussion.

The prize, I submit, is well worth our sweat. Not many centuries ago, every lawyer had the linguistic and terminological ability to exchange thoughts with every one of his brethren within the orbit of Western civilization. The decline of classical education, and the advent of national codes and other forms of legal sectionalism, destroyed the cosmopolitan culture of our profession. Except for a group of specialists, the lawyers of the world, and even of the free world, today lack the bond which could be woven from shared knowledge and common understanding. If new light is to be found in this darkness, we, the teachers of comparative law, must strengthen our muscle to carry the torch.

[25] See Schroeder, Comparative Law: Teaching Lawyers (paper prepared for the Fourth International Congress of Comparative Law).

[26] I must repeat here, with special emphasis, the caveat in n. 19 *supra*.

A. H. ROBERTSON

Different Approaches to European Unity

Introduction

THE LAST EIGHT YEARS HAVE SEEN the evolution of thirteen different projects, each one having as its object the closer integration of a certain group of European countries in a specific field. Ten of these projects have reached fruition by giving birth to an international organisation entrusted with the fulfilment of definite tasks; another three are in an advanced stage of preparation. Between them they embrace such diverse subjects as national defence, coal and steel, customs rates and nuclear research.

Why have so many European agencies come into existence or been planned? What countries are involved in them? How do they compare in their constitution and powers? What are the important tendencies in this process of evolution—or, in other words, where are we going? These are the questions which naturally spring to mind; without being able to answer them all, this article will attempt to shed some light that may help to find the answers.

Before entering into any details, there is one general observation to be made, the proof of which will be found in what follows. We are in the middle of a process of evolution. The European international structure is more fluid than at any time since the years following the French Revolution. There is general recognition that new problems exist and that new solutions are required; but there are many divergent views as to what those solutions should be. The basic problem is that the existing political structure of Europe does not correspond to the needs of the twentieth century, when the individual countries are interdependent as never before. Their interdependence in the military sense was conclusively proved by the last war; if any doubts remained, they were shattered by the atom bomb. The interrelation of their economies is equally apparent. Traditionally, national governments have been responsible for the military security and the economic and social well-being of their peoples. But all European governments now realise that their security and prosperity depend on events beyond their frontiers over which they have no direct control. How, therefore, can they discharge their responsibilities? That is the basic problem of modern Europe.

A. H. ROBERTSON is Member of the Council of Europe Secretariat and Joint Editor of the European Yearbook.

The different European organisations which have been evolved in the last few years represent different attempts to find solutions to that basic problem. Most of them are designed to tackle only limited aspects of it: thus three are, or have been, of a military nature and seven have economic functions. Of this second group, several are restricted to specific sectors of economy, such as coal and steel, agriculture or transport. Some organisations embrace fifteen or eighteen states; but there is a smaller group of six showing a distinct trend towards a restricted federation. Any thorough analysis must also take account of the differences in political conception: some European organisations are based on the principle of intergovernmental consultation, while others include parliamentary organs and yet a third group is engaged in the creation of a supra-national authority.[1]

The thirteen organisations referred to above are listed below.[2] Three of them are still in the blue-print stage. One of them, the Economic Commission for Europe, is, of course, a regional organ of the United Nations. Certain of the organisations listed include non-European states—the most important of these being N.A.T.O.—but are included here as forming an important part of the international structure of Europe; N.A.T.O., indeed, forms such an important element that any picture which omitted it would be seriously misleading.

List of Organisations Considered

Already created

1. The Economic Commission for Europe of the United Nations
2. The Brussels Treaty Organisation
3. The Organisation for European Economic Co-operation
4. The North Atlantic Treaty Organisation
5. The Council of Europe
6. The European Coal and Steel Community
7. The Customs Co-operation Council
8. The Northern Council
9. The Conference of Ministers of Transport
10. The European Organisation for Nuclear Research

[1] Another subject for study is the relationship between European organisations and the world-wide system of the United Nations and its Specialised Agencies. Reasons of space prevent its consideration in this article. But see N. J. Padelford: "Regional Organisation and the United Nations," 8 International Organisation (1954) 203–216; and C. W. Jenks: "Regional Co-operation in relation to World Organisation," in European Yearbook Vol. 1, 1954.

[2] This list is not exhaustive. It omits the Central Commission for Navigation on the Rhine which, having been founded in 1831, is the oldest international organisation in existence, the Benelux Customs Union, which works quietly behind the scenes but has so far little constitutional interest, and perhaps others. Moreover, since this article was started, two new projects have been launched, for a European Civil Aviation Conference and a Balkan Pact between Greece, Turkey and Yugoslavia. These are referred to later in the text.

Under negotiation

11. The Conference on the Organisation of Agricultural Markets
12. The European Defense Community
13. The European Political Community

In order to see how these different pieces fit into the jig-saw puzzle which is modern Europe, it is necessary first of all to give a few basic facts about each of them.[3]

1. *The Economic Commission for Europe of the United Nations.* The E.C.E. was established by the Economic and Social Council of the United Nations on 25th March, 1947. It consists of the European members of the United Nations,[4] and the United States. A number of European countries which are not members of the United Nations also participate in its work in a consultative capacity.

The Commission normally meets once a year at the European Headquarters of the United Nations in Geneva, where it has a permanent secretariat. The task of E.C.E. is to facilitate concerted action to raise the level of European economic activity and to maintain and strengthen the economic relations of European countries both among themselves and with other countries. It has separate committees on coal, electric power, industry and materials, inland transport, timber, steel and manpower; also an Ad Hoc Committee on Industrial Development and Trade. The secretariat produces an Annual Economic Survey of Europe and other studies of considerable value.

The importance of the E.C.E. has somewhat diminished on account of the creation in 1948 of O.E.E.C., but it nevertheless retains great value as the only European organisation in which the countries of East and West continue to co-operate.[5]

2. *The Brussels Treaty Organisation.* The Brussels Treaty for "economic, social and cultural collaboration and collective self-defence" was con-

---

[3] It is not easy to give indications where further information may be found about all the organisations mentioned. A number of them are analysed and discussed in K. Loewenstein, "The Union of Western Europe—Illusion and Reality," 52 Columbia Law Review (1952) 55 and 209. Useful summaries relating to O.E.E.C., N.A.T.O., the Council of Europe and the E.C.S.C. are given from time to time in the quarterly *International Organisation* published by the World Peace Foundation (Boston). But there is little published information readily available about a number of European organisations. *The European Yearbook* is intended to fill this gap. Its first volume will appear early in 1955. Certain further references are given in subsequent footnotes.

[4] Belgium, Byelorussia, Czechoslovakia, Denmark, France, Greece, Iceland, Luxembourg, the Netherlands, Norway, Poland, Sweden, Turkey, Ukraine, U.S.S.R., the United Kingdom and Yugoslavia. See also note 25.

[5] The most convenient sources for further information about E.C.E. are the annual *United Nations Yearbook* and the annual *Report of the Secretary-General of the United Nations on the Work of the Organisation.*

cluded between Britain, France and three Benelux countries (Belgium, the Netherlands and Luxembourg) on 17th March, 1948. The Treaty set up a Consultative Council, "so organised as to be able to exercise its functions continuously," which consists of the Ministers for Foreign Affairs of the five countries and meets yearly, when progress reports are discussed and new policy directives issued. Continuity is assured by the Permanent Commission of ambassadors, which meets monthly, by a series of technical committees and by a permanent secretariat with its seat in London.

Of the four objects stated in the Preamble, and quoted above, the most important originally was the military one, and this led to the creation of a Permanent Military Committee and of a joint military organisation, known as Uniforce, with headquarters at Fontainebleau. The latter was subsequently absorbed into the framework of N.A.T.O. Similarly, the economic objects of the Treaty were later taken over by O.E.E.C. As a result, the functions of the Brussels Treaty Organisation for the last few years have been limited for the most part to the social and cultural fields, in which a large measure of collaboration has been established between the five powers concerned.[6]

3. *The Organisation for European Economic Co-operation.* This organisation was created by the Convention for European Economic Co-operation signed in Paris on 16th April, 1948. Its eighteen members include all the Western European states except Spain.[7] The governments of the United States and Canada are closely associated with the organisation and attend many of its meetings.

The immediate object of O.E.E.C., when it was created, was the drawing up and execution of a joint recovery programme permitting its members to achieve as soon as possible a satisfactory level of economic

[6] While this article was in the press, the London and Paris conferences in October 1954 decided to strengthen and expand the Brussels Treaty by (1) admitting the German Federal Republic and Italy to membership, (2) extending its powers so as to include *inter alia* an Armaments Control Agency, and (3) adding a parliamentary Assembly which will consist of the representatives of the Brussels Treaty Powers to the Consultative Assembly of the Council of Europe. As thus modified, the organisation will be known as Western European Union and will take the place of the proposed but unratified European Defense Community as the means of securing the controlled rearmament of Germany within the framework of N.A.T.O.

Information on the past activities of the Brussels Treaty Organisation may be found in its annual Reports to the Consultative Assembly of the Council of Europe (Documents of the Assembly 1952 doc. 39, 1953 doc. 175 and 1954 doc. 267).

[7] The original members were Austria, Belgium, Denmark, France, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Sweden, Switzerland, Turkey, and the United Kingdom. The German Federal Republic and the Anglo-American zone of the Free Territory of Trieste have been admitted subsequently.

activity without extraordinary outside assistance. This "joint recovery programme" was, of course, the Marshall Plan and O.E.E.C. was responsible for planning on the European side the most effective distribution of American aid. The fact that none of the Eastern European countries is a member of the Organisation results from their refusal of the invitation issued by Britain and France to the conference convened to draw up a programme for economic recovery for transmission to Mr. Marshall, in response to his speech at Harvard on 5th June, 1947. Since the end of that programme, O.E.E.C. has continued to pursue its long term objective set out in the members' undertaking "to work in close co-operation in their economic relations with one another." O.E.E.C. has been responsible for achieving a large measure of liberalisation of trade between its members, for the creation in 1950 of the European Payments Union and for setting up a European Productivity Agency in 1953.

The Organisation is directed by a Council, consisting of representatives of all members, which meets twice a year "at ministerial level," that is to say with the participation of the Foreign Ministers or other ministers for finance or trade; it meets about once a month "at official level" or, in other words, with the attendance of senior officials (usually the heads of the permanent delegations) to represent their governments. It has an Executive Committee which meets weekly and prepares the work of the Council. The rather complex structure of the organisation also includes: the Managing Board of the European Payments Union; the Steering Board for Trade for the implementation of the Code of Liberalisation of Trade; a Productivity Committee to operate the European Productivity Agency; and twenty technical committees. The seat of the organisation is in Paris.[8]

4. *The North Atlantic Treaty Organisation.* The North Atlantic Treaty was signed in Washington on 4th April, 1949, by the Governments of Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom, and the United States. Greece and Turkey were admitted to membership in February, 1952. The main object of the treaty was collective self-defence, for which purpose the members agree "by means of continuous and effective self-

[8] For further information on O.E.E.C. see Loewenstein, *op. cit.* note 3 *supra*, 81–86 and J. Szuldrzynski, "Legal Aspects of O.E.E.C.," 2 International and Comparative Law Quarterly (1953) 579. See also "O.E.E.C. at Work for Europe" published by O.E.E.C. (Paris) 1954; the Annual Reports of the Organisation; its Reports to the Consultative Assembly of the Council of Europe (Documents of the Assembly 1951 docs. 6 and 63, 1952 docs. 7 and 41, 1953 doc. 178 and 1954 doc. 229); and articles by R. Marjolin (the Secretary-General) and others in European Yearbook, Vol. I (1955).

help and mutual aid, to maintain and develop their individual and collective capacity to resist armed attack." Article 2 of the treaty contains certain non-military objectives, which include "strengthening their free institutions .... promoting conditions of stability and well-being .... and encouraging economic collaboration ...."

The seat of the organisation is in Paris, though the Standing Group and its Military Committee are in Washington. The Supreme Allied Command for Europe is at Marly, near Paris, and the Supreme Allied Command (Atlantic) is at Norfolk, Virginia.[9]

5. *The Council of Europe.* The Statute of the Council of Europe was signed in London on 5th May, 1949, by the Governments of Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway Sweden and the United Kingdom. Greece and Turkey became members later that year, as did Iceland, the German Federal Republic and the Saar in 1950.[10] The aim of the Council of Europe is "to achieve greater unity between its members .... by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms." This task is entrusted to the two organs of the Council: the Committee of Ministers and the Consultative Assembly. The Committee of Ministers is the executive organ of the Council and consists of the Foreign Ministers of the fourteen full members. It meets rarely (once or twice a year) at the ministerial level, but more frequently (about every six weeks) at the official level. It has a number of expert committees on social, cultural, legal and administrative subjects. The Consultative Assembly is the deliberative organ of the Council and is its distinctive feature. It consists of 132 members of parliament from the fifteen member countries, who are not representatives of their governments but sit in the European Assembly in their individual capacity.

The seat of the Council of Europe is at Strasbourg.[11]

6. *The European Coal and Steel Community.* The European Coal and Steel Community was created by a treaty signed in Paris on 18th April,

---

[9] See also: W. E. Beckett: "The North Atlantic Treaty, the Brussels Treaty and the Charter of the United Nations," Library of World Affairs, 1950; Loewenstein, *op. cit.* note 3, pp. 220–224; and Col. R. J. Wood: "The First Year of S.H.A.P.E.," 6 International Organisation (1952) p. 175.

[10] The German Federal Republic and the Saar were admitted as associate members; the former became a full member in 1951.

[11] See further: A. H. Robertson: "The Council of Europe 1949–1953," 3 International and Comparative Law Quarterly (1954) 235 and 404, and references given therein at note 4. See also: "The Council of Europe" by L. Marchal (the Secretary-General) in European Yearbook, Vol. I (1955).

1951, by the Governments of Belgium, France, the German Federal Republic, Italy, Luxembourg and the Netherlands, commonly known as "the Schuman Plan." The six governments stated that they were "resolved to substitute for historic rivalries a fusion of their essential interests: to establish, by creating an economic community, the foundation of a broad and independent community among peoples long divided by bloody conflicts: and to lay the bases of institutions capable of giving direction to their future common destiny." They then established "a common market, common objectives and common institutions" for the coal and steel industries of the six countries.

In order to achieve these objectives, the treaty then makes an even more radical departure from established practice than had been made two years before in the creation of the Council of Europe, for it sets up four organs or institutions of the Community—the High Authority, the Common Assembly, the Special Council of Ministers, and the Court of Justice. The High Authority of nine members has what have come to be known as "supra-national powers," that is to say that it is not answerable to or controlled by governments but can, on subjects within its competence, take decisions which are themselves binding in all six countries. For certain decisions it requires the agreement of the Special Council of Ministers, which consists of one minister from each of the six countries. The High Authority is only answerable to the Common Assembly, which can dismiss it by a vote of censure passed by a two-thirds majority. The Assembly is composed of 78 members of parliament, 18 each from France, the German Federal Republic and Italy, 10 each from Belgium and the Netherlands and 4 from Luxembourg. The Community has its own Court of Justice, with seven judges, which has jurisdiction to determine whether the decisions of the High Authority are in conformity with the treaty and generally to judge the constitutionality of the acts of all organs of the Community.

The seat of the Community is at Luxembourg.[12]

7. *The Customs Co-operation Council.* The conference which drafted the Convention of O.E.E.C. in 1947 also set up a "European Customs Union Study Group" with the task, as its name implies, of studying the

[12] See also articles on "The Schuman Plan" by W. N. Parker, 6 International Organisation (1952) 381; J. A. McKesson, 68 Political Science Quarterly (1952) 18; R. Vernon, 47 American Journal of International Law (1953) 183; and G. Bebr, 63 Yale Law Journal (1953) 1. For further information see the General Report of the High Authority on the Activities of the Community 1952–3 (reprinted in Documents of the Consultative Assembly of the Council of Europe, 1953, doc. 121) and *idem* 1953–4 (reprinted *ibidem* 1954 doc. 228); also "The Coal and Steel Community at Work" by Franz Etzel, Vice-President of the High Authority, in European Yearbook, Vol. I (1955).

possibility of creating a European Customs Union. The countries which participated in this work were the same as the members of O.E.E.C. The Study Group set to work, but its investigations quickly revealed the appalling complexity of the task of creating a customs union between sixteen countries with such widely divergent and individually complex economies, several of which already had preferential systems with their overseas territories. Before long its sights were lowered, and its objectives reduced to co-operation between its members in the operation of their tariff systems. Conventions were concluded on systems of customs nomenclature and valuation, and in 1951 the original Study Group was replaced by a Customs Co-operation Council which was given the functions of "studying all questions relating to co-operation in customs matters" and "examining the technical aspects and economic factors of customs systems with a view to attaining the highest possible degree of harmony and uniformity."

The Customs Co-operation Council meets twice a year. It is assisted by a Permanent Technical Committee and a General Secretariat, as well as a variety of other specialised committees.

The seat of the organization is at Brussels.

8. *The Northern Council.* The Northern Council was created in 1953 by the four Scandinavian countries: Denmark, Iceland, Norway and Sweden. A considerable degree of collaboration already existed between these states, exercised through regular meetings of their foreign ministers and through a number of permanent commissions designed to secure common or parallel action in various technical fields such as social policy, cultural co-operation and uniform legislation. The new feature introduced by the creation of the Northern Council was to add to the existing machinery a parliamentary body consisting of 53 representatives[13] drawn from the four national parliaments, which could discuss matters of common interest to the four countries and propose what action should be taken thereon. Like the Assembly of the Council of Europe, it is a consultative body with the power of making recommendations but not of taking decisions. The various permanent commissions for Scandinavian co-operation will make annual reports to the Council, and the four governments will report on the action they have taken on the recommendations made to them by the Council.

The Northern Council has no permanent seat or staff. Its meetings will rotate between the four Scandinavian capitals, the first having been held in Copenhagen in 1953, and the administrative services being

[13] 16 each from Denmark, Norway and Sweden and 5 from Iceland.

provided by four national secretariats, with that of the host country taking the lead at each individual session.[14]

9. *The Conference of Ministers of Transport.* This organisation was created by the signature of a Protocol in Brussels on 17th October, 1953. It has the same membership as O.E.E.C. except for the addition of Spain and the omission of Iceland and Ireland. Its object is to secure the maximum use and most rational development of European inland transport of international importance. It operates through regular but infrequent meetings of the Ministers of Transport of the member countries, supplemented by more frequent meetings of their Deputies. It has a small permanent secretariat in Paris.[15]

10. *The European Organisation for Nuclear Research.* The Convention for the creation of the European Organisation for Nuclear Research was signed in Paris on 1st July, 1953, by twelve European states: Belgium, Denmark, France, German Federal Republic, Greece, Italy, Netherlands, Norway, Sweden, Switzerland, United Kingdom and Yugoslavia. Its object is collaboration in nuclear research of a pure scientific and fundamental character, excluding work for military requirements, and the construction and operation of an International Laboratory for research on high energy particles, including work in the field of cosmic rays.

The seat of the organisation is in Geneva.[16]

11. *The Conference on the Organisation of Agricultural Markets.* Soon after the Schuman Plan was launched in 1950 for the organisation of a common market for coal and steel, it was suggested that a similar common market should be established for agricultural products, or, as it came to be known, a "Green Pool." After this idea had been discussed in various circles, particularly in the Consultative Assembly of the Council of Europe, a European Conference on the Organisation of Agricultural Markets was convened in Paris in March, 1953, comprising the member states of O.E.E.C. and Spain. The Agenda of this Conference included the organisation and unification of European agricultural markets and the structure and powers of the institutions necessary for this purpose. After a comparatively short session of the Plenary Conference, an

[14] See further: article by the Norwegian Foreign Minister, Halvard Lange, "Scandinavian Co-operation in International Affairs," 30 International Affairs (1954) 285. The Statute of the Northern Council and certain additional information are given in European Yearbook Vol. I (1955) Documentary Section, Chapter 5.

[15] The Protocol establishing the Conference and other information is given in European Yearbook, Vol. I (1955) Documentary Section, Chapter 6.

[16] The text of the Convention and other information are given in European Yearbook, Vol. I (1955) Documentary Section, Chapter 8. The Convention entered into force in September 1954.

Interim Committee was created which, up to the time of writing, has been in almost continuous session studying the problems and possibilities of establishing a common market for agricultural products and the organisation that would be involved. It is still too soon to know whether or not these negotiations will give birth to a "European Agricultural Community" or some other new organisation on those lines.[17]

12. *The European Defence Community.* The Treaty instituting the European Defence Community was signed in Paris on 27th May, 1952, by the Foreign Ministers of the six powers which are members of the Coal and Steel Community: Belgium, France, German Federal Republic, Italy, Luxembourg and the Netherlands. The treaty provides for the merger of all land, air and coastal forces maintained by the six powers for the defence of Europe for a period of fifty years, control of the forces thus merged being vested in the community.

The structure proposed for the E.D.C. is similar to that of the Coal and Steel Community, consisting of a Board of Commissioners, which will be its executive organ and "shall neither ask nor receive instructions from any Government;" the Council of Ministers, which will represent the Governments and can, provided that it is unanimous, issue general policy directives to the Board; an Assembly, which will be the same body as the Common Assembly of the Coal and Steel Community except that France, Germany and Italy will each have three additional representatives; and a Court of Justice, which will be the same Court as that of the E.C.S.C.

The Board of Commissioners will have the tasks of organising the E.D.C. forces, supervising recruitment, training and equipping the forces, preparing mobilisation plans and drawing up the armaments programme and the E.D.C. budget. The Council of Ministers must approve the budget, the financial contributions of individual members, the organisational plan and the appointment of senior officers. The Assembly will hear and debate the annual report of the Board of Commissioners; it can pass a vote of censure on them and thus force them to resign; and it will have the right to reject, or propose amendments to, the budget. The main function of the Court is to determine the constitutionality of acts of the Board.[18]

---

[17] At the meeting of the conference in July 1954, it was agreed to propose the creation of a permanent Conference of Ministers of Agriculture, which would correspond broadly to the Conference of Ministers of Transport, but operate within the framework of O.E.E.C. For further information, see European Yearbook, Vol. I (1955) Documentary Section, Chapter 7.

[18] Since the above text was written the action of the French National Assembly in refusing to ratify the E.D.C. Treaty has sounded the death-knell of the Defense Community. *Cf.* note 6 above.

13. *The European Political Community.* While the E.D.C. Treaty provides that the Assembly of the Defence Community shall be the same as the Coal and Steel Assembly, this is an interim measure. The Assembly is entrusted with the task of studying the constitution of a permanent parliamentary organ elected on a democratic basis in accordance with the following principles:

". . . . the permanent organisation replacing the present provisional organisation shall be so conceived as to constitute one of the elements of a subsequent federal or confederal structure based on the principle of separation of powers and, in particular, on a bicameral system of representation.

"The Assembly shall also examine the problems arising from the co-existence of various organisations for European co-operation which already have or may subsequently come into being, so as to ensure co-ordination within the framework of the federal or confederal structure."

In order to gain time the six Foreign Ministers on 10th September, 1952, decided not to wait for the E.D.C. Treaty to be ratified and invited the members of the Coal and Steel Assembly to undertake the task of working out a draft Treaty for a Political Community, based on the principles set out in Article 38 of the E.D.C. Treaty quoted above; they also recommended that the Assembly should invite observers from the other member states of the Council of Europe and report on the progress of its work to the Consultative Assembly of the Council.

The Coal and Steel Assembly accepted this invitation. When undertaking its new task, and with its numbers slightly augmented, it assumed the title of the "Ad Hoc Assembly." By March 10th, 1953, it had prepared and formally transmitted to the Foreign Ministers of the Six Powers the "Draft Treaty Embodying the Statute of the European Community."

This draft Treaty has no official character. No government or parliament has endorsed it. But having been elaborated by 87 members of six national parliaments, with the active collaboration of observers from the U.K., the Scandinavian countries, Greece and Turkey, it represents a point of departure of great importance. Since its completion it has been under active examination by the six governments, but, at the time of writing, no final decision has been taken on its adoption or amendment.

The "European Community" which the draft Treaty purports to create would consist, initially at least, of the same six countries as the Coal and Steel Community and the Defence Community. The new Community, indeed, would merge the other two in something greater, adding political and general economic powers to the military and in-

dustrial functions conferred by the earlier treaties. These extensive powers would be exercised, subject to an elaborate system of checks and balances, by four organs corresponding in their essentials to those of the E.C.S.C. and the E.D.C.: a Parliament, an Executive Council, a Council of National Ministers and a Court of Justice. These four organs would gradually take over the functions of, and eventually replace, the corresponding organs created by the two earlier treaties.

The new powers which the draft Treaty proposes to confer on the European Community are extensive. They include the co-ordination of the foreign policies of member states, common representation of the members, the conclusion of treaties and the peaceful settlement of disputes; in the economic field, the progressive establishment of a common market based on the free movement of goods, capital and persons, with a Readaptation Fund to mitigate hardships; in fiscal matters, there is to be a common budget financed both by taxation and by contributions from member states.[19]

It is not easy to trace any consistent trends of development or any sure criteria for comparison in this welter of organisations, treaties and proposals. In fact, we are in the middle of a process of evolution and too near to events to evaluate them in their proper perspective. Nevertheless an attempt will be made (even though the conclusions will be provisional and subject to revision) to make certain comparisons and elucidate certain tendencies, with particular reference to the membership, functions, powers and structure of the organisations considered.

Membership

There are two divergent trends to observe in the membership of European organisations. The first of these is the expansion of a nucleus of five states to a group of sixteen, which are now members of most of the European organisations of a non-federalist character. The original five were the signatories of the Brussels Treaty in 1948: France, the United Kingdom and the three Benelux countries, Belgium, Netherlands and Luxembourg. This group was expanded to ten when, early in 1949, Italy, Ireland and the three Scandinavian countries (Denmark, Norway

[19] See further: articles on the proposed Political Community by A. H. Robertson, 29 British Yearbook of International Law (1952) 387; H. W. Briggs, 48 American Journal of International Law (1954) 110; and B. Karp, 8 International Organisation (1954) 181. *Cf.* also Lord Layton, "Little Europe and Britain," 29 International Affairs (1953) 292.

The death of the E.D.C. (see note 18) will probably prevent further progress being made for a number of years in the development of the Political Community. Nevertheless the advocates of European federation are sufficiently numerous and influential to inspire the belief that the last has not been heard of this proposal.

and Sweden) joined them in the negotiations leading to the creation of the Council of Europe. In the summer of 1949, Greece and Turkey joined the group, and the German Federal Republic followed suit the next year. All thirteen are now members of O.E.E.C., the Council of Europe, the Conference of Ministers of Transport[20] and the Customs Co-operation Council; moreover, they all participated in the Conference on Agricultural Markets and the Conference on Air Transport.[21] Ten of them are also members of N.A.T.O.[22] In addition to the thirteen, Austria, Portugal and Switzerland are members of all the economic organisations mentioned, but not of the Council of Europe.[23]

We thus arrive at a group of sixteen states, which comprises all the major western European countries except Spain, and constitutes the core of European intergovernmental co-operation.[24] In accordance with the policy by which the General Assembly of the United Nations in 1946 excluded Spain from the U.N. and the Specialised Agencies, this country was not invited to join O.E.E.C., N.A.T.O. and the Council of Europe. More recently, however, Spain has become a member of the Conference of Ministers of Transport and participated in the conferences on Agricultural Markets and Air Transport.

The Economic Commission for Europe, of course, differs considerably from the standard pattern. Since it is an organ of the United Nations, Austria, the German Federal Republic, Ireland, Italy, Portugal and Switzerland are not members[25] but the following states are: the United States, Yugoslavia and the Eastern European powers of Byelorussia, Czechoslovakia, Poland, the Ukraine and the U.S.S.R.

---

[20] Ireland, however, for geographical reasons, is not a member of this organisation.

[21] The Conference on the Co-ordination of Air Transport in Europe met at Strasbourg from April 21 to May 8 1954, having been convened by I.C.A.O. on the invitation of the Council of Europe. It recommended the creation of a permanent European Civil Aviation Conference rather similar in character to the Conference of Ministers of Transport.

[22] The German Federal Republic, Ireland and Sweden do not belong to N.A.T.O., though Western Germany will become a member as soon as the Paris Agreements of October 1954 are ratified.

[23] Austria is at present prevented by the Occupation Statute, and Switzerland by her traditional policy of neutrality. Portugal seems not interested in joining the Council for political reasons.

[24] The minor variations in membership as compared to the sixteen states mentioned above are as follows: *O.E.E.C.* and the *Customs Co-operation Council* include Iceland and Trieste in addition to the sixteen. The *Conference of Ministers of Transport* omits Ireland but includes Spain. The *Conference on Agricultural Markets* includes both. The *Council of Europe* omits Austria, Portugal and Switzerland but includes Iceland and the Saar. *N.A.T.O.* omits Austria, the German Federal Republic, Ireland, Switzerland and Sweden but includes Canada, Iceland and the U.S.A. The *Organisation for Nuclear Research* omits Austria, Ireland, Luxembourg, Portugal and Turkey but includes Yugoslavia.

[25] Though they all participate in a consultative capacity, except the German Federal Republic.

Contrasted with these major European organisations is the "Little Europe" of six. This consists of the members of the Coal and Steel Community: France, Germany, Italy and the three Benelux countries. They form a distinctive group in having created one organisation of a supranational character, in having signed a treaty for the creation of a second organisation of this type (the European Defence Community) and in planning yet a third—the Political Community.[26] As all three show trends of a federalist character, the Six constitute a special group which differs qualitatively as well as quantitatively from the Sixteen,[27] whose other members have not shown any inclination to embark on the road to federation.

How firmly the Little Europe of Six is committed to an ultimate federation, it is too early to say. The Schuman Plan was consciously conceived as a first step in this direction. Two years ago, when the Coal and Steel Community had come into existence, when the Treaty for the Defense Community had been signed and when the Ad Hoc Assembly was engaged, at the invitation of the six Foreign Ministers, in drafting its proposals for a Political Community, it seemed beyond doubt that the six States involved were moving rapidly towards some federal or confederal system. Perhaps they were moving too rapidly and the statesmen had gone too fast for public opinion. In any event there has been an unmistakeable slackening of speed, if not a complete halt. Two of the main architects of European federation, MM. Schuman and de Gasperi, are no longer in office. At the time of writing, the E.D.C. Treaty remains unratified, and the negotiations for the Political Community are in the doldrums: the prospects of achieving a political federation of the Six thus seem, at least for the present, far remoter than they did two years ago.

Functions

During the nineteenth century such international organisations as were created were set up to deal with rather limited and specific problems, such as navigation on an international river (the Rhine and the Danube Commissions), the international forwarding of mail (the Universal Postal Union), or the international protection of patents and trade-marks (the International Union for the Protection of Industrial Property). Some of the postwar organisations have equally specific and limited functions, for example, inland transport and nuclear research. But others, starting with the League of Nations, have such wide terms of reference that almost anything is within their competence; the same is true of the

[26] See, however, notes 18 and 19 above.

[27] It is not, however, an exclusive group. Its members have often expressed the hope that other European states, particularly the United Kingdom, would join them.

United Nations and of the Council of Europe.[28] This tendency to define in wide and general terms the competence of international organisations entails as a consequence the possibility of conflict between them.

The organisations considered in this article do in fact cover a wide field and their functions do in certain cases overlap. The most striking case is afforded by the Economic Commission for Europe and O.E.E.C., both of which have general economic tasks, the former in the framework of the United Nations and the latter on a basis of Western European Co-operation. Their co-existence is due to the failure of the attempt to solve European economic problems through collaboration between East and West and the refusal of the Eastern bloc to attend the European Economic Conference convened by France and the United Kingdom in response to the invitation which led to the Marshall Plan. O.E.E.C. was therefore created as a separate organisation for European recovery by those states which accepted American aid and has played the major role in the economic field in Europe during the last five years. At the same time E.C.E. has continued in existence and handles certain economic problems on which East-West co-operation remained possible.

Further overlapping of functions results from the fact that economic matters are also included within the competence of the Council of Europe—there the danger of confusion is greater if proper co-ordination is not achieved, because substantially the same group of states are members of both the Council of Europe and O.E.E.C., and it would be absurd that they should take different decisions about the same problems at Paris and at Strasbourg.

Other dangers of overlapping are easily detected. The conferences dealing with inland transport and agriculture touch particular aspects of the economy whose general supervision is entrusted to O.E.E.C. This is also true of the Coal and Steel Community and, to a lesser extent, of the Customs Co-operation Council. The social and cultural work of the Brussels Treaty Organisation has often tackled on a five power basis problems which are also of concern to the fifteen members of the Council of Europe and, in a number of cases, has assisted the larger group in finding solutions. The European Defence Community, if it comes into existence, will impinge so directly on the work of N.A.T.O. that detailed plans have been worked out for their mutual relations, involving, among other things, the incorporation of the European Army into the forces under N.A.T.O. control.

Overlapping of functions, however, does not necessarily mean duplication of work, provided that adequate steps are taken to ensure that each

[28] Though matters of national defence are outside the competence of the Council of Europe under Article 1 (d) of the Statute.

organisation is kept informed of the work of the others, and that it is careful not to take conflicting or contradictory decisions. Hence the importance of what might be called the new science of co-ordination.[29] In the European organisations this co-ordination is generally achieved in a satisfactory manner by the exchange of information and of observers and, as regards the Council of Europe, by the presentation to its Consultative Assembly of regular reports on the work of the other organisations.[30] In this way the Council is tending to become, as claimed by the Assembly, "the general framework for European policy;" being essentially of a political character, it maintains a broad general view of the activities of the other organisations, which are themselves more technical in character and have more limited functions. To this end the Committee of Ministers for foreign affairs has recommended to all member governments of the Council that they should not create new organisations of a European character without preliminary consultation in the Council of Europe and without linking them in some way to the Council. This decision should constitute a further step in establishing the Council of Europe as the general framework for co-ordinating the activities of European organisations.

Powers

Historically speaking, international organisations derive from international conferences that were convened in previous centuries only when some special occasion so required. The classic procedure of diplomacy through foreign offices and embassies is, of course, primarily suitable for bilateral negotiations between two powers. Problems of importance involving several states, and therefore necessitating multilateral negotiation, have led for more than a century to the holding of conferences at which all the parties concerned can be represented for a time at the same place. The increasing frequency of such problems since 1918 has produced the need for continuing representation of a number of states in the same place, or, in other words, for permanent diplomatic conferences which, as soon as they are served by permanent secretariats, become international organisations.[31] But, though such organisations are per-

[29] See C. W. Jenks: "Co-ordination: a new problem of international organisation," Recueil des Cours, 1950, p. 1. and "Co-ordination in international organisation," 28 British Yearbook of International Law (1951) p. 29.

[30] Such reports are presented by O.E.E.C., the Brussels Treaty Organisation and the Coal and Steel Community, as well as by several of the Specialised Agencies of the United Nations.

[31] *Cf.* Sir Harold Nicolson's Chichele Lectures, 1953, on the Evolution of Diplomatic Method. He draws attention forcibly to the inconveniences resulting from publicity in certain international organisations, as contrasted with the methods of traditional diplomacy; but he omits to mention the revolution in diplomatic method occasioned by the need for quasi permanent multi-lateral negotiation.

manent, they usually have limited powers; the agreements which they produce have usually to be referred back to the governments, either as proposals or recommendations, before they become executory.

Organisations of this sort are, of course, far removed from instruments of international government, since they have no power to take binding decisions. A typical example is afforded by the Council of Europe. Its Committee of Ministers is described as "the executive organ of the Council" but, apart from certain administrative matters, it only has power to make recommendations to the governments, which they are then free to accept or reject as they wish.[32] The Brussels Treaty Organisation is in a substantially similar position; it is basically an organ of consultation.[33] So is the Economic Commission for Europe. O.E.E.C., on the other hand, is in a stronger position, having the power to take decisions which are binding on the governments,[34] (for example as to the liberalisation of trade from quantitative restrictions); the implementation of these decisions, however, remaining the responsibility of the members. The Conference of Ministers of Transport is in a rather similar position to O.E.E.C., since the Ministers can take decisions on matters within their competence of which they themselves will ensure the execution.

N.A.T.O. has not only the legislative power, through its Council, of taking decisions which have binding effect, but also, through the Supreme Commander, the executive power of implementing those decisions, in so far as they relate to the forces under his control. Other examples can be found of the exercise of executive or operational powers by an international organisation, though in most European organisations they are lacking. An outstanding case was U.N.R.R.A. (the United Nations Relief and Rehabilitation Administration) which procured and shipped billions of dollars' worth of supplies and decided on the shares to be allocated to the different recipient countries. U.N.I.C.E.F. (the United Nations' Children's Fund) has similar powers, though they are exercised on a much smaller scale.

The European Organisation for Nuclear Research will have executive powers of a rather special nature in the construction of laboratories and the conduct of research of a scientific character.

---

[32] Though most governments would not authorise their representatives to vote for recommendations which they did not themselves intend to accept. Nevertheless, it remains true that the recommendations have no binding force.

[33] The London Agreements of October 3rd, 1954, however, contained a provision that "the Consultative Council . . . will become a Council with powers of decision." (The Times newspaper, October 4th, 1954).

[34] Article 13 of the O.E.E.C. Convention reads in part ". . . . the Organisation may take decisions for implementation by Members."

The European Coal and Steel Community is, as regards its powers, in a quite special position. The High Authority can take decisions on the matters entrusted to it under the treaty (for example on the opening of the common market in coal and steel, which involves the abolition of tariffs, and on prices for these products) which have the force of law in the member states of the Community. In other words, its decisions do not need to be implemented by national governments: they have themselves the force of government edicts or legislation. Similarly, the decisions of the Court of the Community are executory in the territory of all members of the Community in the same way as judgments of national courts. It is for these reasons that the Community is "supranational" and differentiated from all other European organisations and institutions. The Defence Community and the Political Community are designed on the same pattern, though the supranational characteristics of the E.D.C. are less marked than those of the Coal and Steel Community.

There are thus four degrees in the powers conferred on international organisations. The lowest is to negotiate agreements *ad referendum*; this is the commonest form and is illustrated by the Council of Europe. The second is to take decisions which, once taken, are binding on the governments, but which the governments are responsible for putting into effect (O.E.E.C.). In this case the organisation has no executive powers. The third type is where the organisation can not only take binding decisions but has the executive power to put them into force. An example is afforded by N.A.T.O. The fourth degree is in the supranational powers of the Coal and Steel Community, which enable the High Authority to take decisions which are directly binding on national enterprises without the need for any intervention by member governments.

Internal Structure

The last and perhaps most interesting point of comparison is in relation to the internal structure or composition of the organisations considered.

The origin of international organisations as a device for multilateral negotiation or regulation of particular problems naturally resulted in their composition consisting of representatives of governments. This has been a general characteristic of all international organisations created before 1949.[35] This means, in turn, that the organisations are under the control of the executive in each country and are divorced from any direct contact with, or control by, the legislature.

[35] The International Labour Organisation is a partial exception, since it includes representatives of employers and workers in addition to governmental delegates.

A new departure was made with the creation of the Council of Europe in 1949, since one of its organs is a Consultative Assembly consisting of members of parliament who are not representatives of their governments but attend in their individual capacities. In this way the national legislatures participate directly, through their members in the Assembly, in the work of the organisation; and though the Assembly is only consultative and its powers are limited to making recommendations, the members of parliament can take the initiative in putting forward proposals which they believe to be of European interest, and they receive as of right, and debate in public, reports stating what action the Ministers (as representatives of the governments) have taken on their proposals. Furthermore, the fact that members of the national parliaments have assisted in the elaboration of European projects at Strasbourg increases both the interest in, and the prospects of adoption of, those projects once they come before the national parliaments for ratification.[36]

This precedent of parliamentary participation in international administration has been followed in other cases and developed further. The Coal and Steel Community has an Assembly as one of the institutions of the Community, with far wider powers than those of the Strasbourg Assembly, since it can, like a national parliament, overturn the executive (the High Authority) by an adverse vote. The Assembly of the Defense Community is conceived on similar lines. That of the Political Community, as proposed in the draft treaty, would have even wider powers and be directly elected by universal suffrage.[37]

Nor are these the only institutions to involve the participation of members of parliament. The Northern Council is an international organisation whose only organ is parliamentary. Various bodies for Scandinavian co-operation at the governmental level already existed when the Northern Council was created; its main purpose, therefore, was to associate the national parliaments with a system of consultation from which they had hitherto been excluded.

A strong movement exists to do the same for N.A.T.O. This is at present an exclusively intergovernmental organisation, with a particular interest in avoiding publicity owing to the secret nature of some of its work. Many people believe that, as a result, it is too much out of touch with public opinion and that it does not receive the measure of popular support which it would have if its work was better known and which it needs if its future is to be assured. A parliamentary assembly to discuss

[36] On the rôle of the Assembly in the work of the Council of Europe see further *op. cit.*, note 11 at pp. 416 to 420.

[37] See references given in note 19.

and publicise the work of N.A.T.O. would fill this gap. The Consultative Assembly of the Council of Europe has proposed, in effect, that it should itself be given this rôle.[38] This proposal having been rejected, a movement has been organised to endow the North Atlantic Treaty Organisation with a parliamentary assembly of its own.[39]

The latest development along these lines is in the Balkan Pact, which is an alliance between Greece, Turkey and Yugoslavia that will bring the last-named indirectly into the Western defense system, even though it is not a member of N.A.T.O. This Pact sets up machinery for consultation between the three countries which includes a permanent council of the foreign ministers to meet twice a year and envisages the creation of a parliamentary assembly, with equal representation of the three national parliaments, which will meet regularly once a year.[40]

These illustrations will suffice to show that the participation of members of parliament in international administration has become, in only five years, an established practice. At a time when the number of organisations is matched by their variety, it would not be too much to say that this practice represents one of the most significant developments in the evolution now taking place in the complex art of conducting international relations. It seems probable that the influence of members of parliament on the work of international organisations is only beginning to be felt and that a great deal more of it will be seen in the future.

---

[38] Recommendation 37 of 27th September 1952 and Recommendation 50 of 22nd September 1953.

[39] The International Atlantic Committee held the "Second International Study Conference" on the Atlantic Community in Copenhagen from 30th August to 5th October, 1953. A resolution proposing the creation of a parliamentary assembly for N.A.T.O. was tabled but not formally adopted in order to permit the idea to be further explored on an unofficial basis.

[40] See "The Times" of 10th August, 1954.

T. B. SMITH

English Influences on the Law of Scotland

General and Historical

The Scottish legal system applies only to a population of some five million within the borders of Scotland. Its extension overseas to the Scottish settlements in Darien and Nova Scotia during the 17th Century was shortlived; and, as will be discussed in the context of Constitutional Law, after the Union of 1707, English law became the personal law of British settlers in the Commonwealth overseas. Like the law of Quebec, Louisiana, and South Africa, Scottish law does not fit easily into the familiar divisions frequently made by comparative lawyers between civil law and common law systems, or between code law and case law system.

But for the Union with England, Scotland might well have codified at least her civil law in the early 19th Century, like those countries with which she had close affinities in legal thought. The Scottish institutional writers such as Stair, Bankton, Kames, Erskine, and Bell—who still are treated as weighty authorities—owed much of their inspiration to Roman doctrine; and had done for Scots law a comparable service to that done by Pothier and Domat for French law prior to the Napoleonic codification. The possibility of fixing the orientation of Scottish law by codification really passed when, during the 19th Century, many new legal situations common to both Scotland and England resulted in the development of a substantial amount of what was in effect British law. In this development Scottish and English solutions affected each other reciprocally, and separate general codification of law for one country only ceased to be a practical proposition.

Though some chapters of Scottish law are founded on indigenous custom—as, for example, the rules as to "legal rights" which may be claimed in the estate of a deceased by a surviving spouse or children—the Scottish system has been largely developed by comparative jurisprudence, and has drawn its principles, its categories and its methods from different sources at different stages of its evolution.

English law has superseded Roman law as the main source of comparative legal principles taken into account by Scottish lawyers when

T. B. Smith is Professor of Scots Law, University of Aberdeen.

faced with novel situations. The point must be made, however, that, while Roman law has been, and is still to some extent relied on in Scotland for its reason and equity, and is thus accepted with gratitude and goodwill, the influence of English law has not always been accepted willingly and on its merits. It would be ungracious and unscholarly to deny the value of English jurisprudence to Scottish law, but there have also been quite numerous instances of the imposition on the Scottish system of unwelcome and retrograde English doctrines—such as those mentioned later in connection with contract and reparation. In short, while English influence can be, and often has been, beneficial when adopted as the result of comparative study and evaluation, forced and ill-considered "anglicization" of Scottish law is a constant source of confusion and frustration. The fact that, in modern times at least, such "anglicization" is seldom pursued as a deliberate policy by the Legislature or House of Lords, but results usually from good intentions combined with a lack of awareness that some well-established Scottish legal principle is involved, does not necessarily alleviate the frustration.

Before proceeding to examine in more detail the influence of English law upon that of Scotland, it may be well to explain briefly why two substantially divergent systems developed within the same island, and why this divergence survived the political fusion of Scotland and England in the state of Great Britain. The key to the situation is historical.

There was a period prior to the late 13th Century when relations between Scotland and England had been, on the whole, friendly. At that period the English common law had achieved a remarkable maturity in relation to the standards of contemporary European civilization, and those responsible for the administration of justice in Scotland were not slow to recognize the benefits of importing and adapting English legal ideas and institutions. However, after the deaths of Alexander III and Queen Margaret of Scotland (Maid of Norway), Edward I of England thought to subordinate Scotland to the English Crown. After a period of internal division and defeat, about the mid-14th Century, Scotland, under the leadership of Robert I (The Bruce) eventually forced the relinquishment of English claims to suzerainty. War between Scotland and England, however, continued intermittently for about three centuries, and one result of the consequent hostility between the two countries was a certain revulsion in Scotland against English methods, including those of English law. It was in the continental universities teaching Civil and Canon law—first of Italy then of France and ultimately of the Low Countries and Germany—that Scotsmen studied the law.

Until the reign of James VI, who became in 1603 also King of England, the predominant foreign cultural and political influences were French—and French influence was fully and gratefully acknowledged in Scottish jurisprudence. Bishop Elphinstone, the founder in 1494 of King's College (then St. Mary's College) in the University of Aberdeen, himself a distinguished teacher of law in the Universities of Paris and Orleans, laid down that law should be taught in Aberdeen according to the practice of these Universities. Even during the Dark Age of Scots Law, there were many able lawyers in Scotland, especially ecclesiastics, who were well grounded in the Roman and Canon Law. The founding of the Court of Session (Scotland's supreme civil court) in 1532 provided the opportunity for a professional and permanent judiciary to develop the law of Scotland in the tradition of their continental training. It was, however, about a century later before Scottish law was well launched on what might be described as the "Roman phase"—which lasted from the 16th to the late 18th Century. During this period the civil law as expounded by continental commentators was freely cited, it inspired the Scottish institutional writers, and references to English law were relatively infrequent. Indeed, English decisions were neither readily accessible nor comprehensible outside England.

It will be noted that the "Roman phase" of Scots law continued long after the Union of the Crowns of Scotland and England in 1603 and of the Parliaments in 1707. James VI and I, it is true, after 1603 contemplated assimilating the legal systems. Francis Bacon, in a memorial entitled "Certain Articles or Considerations touching the Union of the Kingdoms of England and Scotland" counselled, however, that precipitate assimilation of substantive private law would be undesirable, and predicted that serious friction would result were English law to be pressed on Scotland at that time. When the Treaty of Union was negotiated in 1706 (ratified in 1707) special care was taken in Articles 18 and 19 to safeguard the independence of the Scottish courts and legal system. As a result, with Court and Parliament both in London, the Scottish legal system has come to enjoy a special prestige and importance, symbolizing and safeguarding Scotland's equal status in the Union with England. Though, the Scottish judicial system was at the time of the Union not beyond reproach, the substantive civil law of Scotland, which had been restated by Stair in 1681 in accord with the most enlightened continental teaching on Roman and natural Law, could more than hold its own in competition against the narrow and formalistic English law of that time. During the 18th Century many of those who aspired to practice law in Scotland continued to complete their legal education abroad, particularly in Leyden and

Utrecht. Moreover, the Union of Scotland and England in 1707 did not forthwith produce the benefits which its advocates in Scotland had anticipated, and relations between the Scottish and English nations were strained by a deterioration in Scotland's economic condition and by two major armed risings during the first half of the 18th Century. These risings gained support, not only from convinced supporters of the House of Stuart, but also from those disillusioned by or hostile to the Union of 1707. Only towards the end of the 18th Century did conditions and mutual understanding improve. These developments prepared the way for a greater measure of willing acceptance in Scotland of English legal influence, especially since, in the meanwhile, Mansfield, himself a Scotsman with some grasp of his native jurisprudence, had substantially rationalized English mercantile law in particular. The Treaty of Union had, however, opened two channels for English legal influences which were not necessarily dependent on free and willing acceptance by Scotsmen. In the first place, the new Parliament of Great Britain was empowered, subject to certain fundamental provisions, to legislate for the new Kingdom as a whole. Secondly, the Treaty was silent (possibly deliberately so) as to the right to take appeals from the Scottish Courts to the judicial organ of the new Parliament of Great Britain (the House of Lords); and soon after the Union the House of Lords upheld its own jurisdiction to hear civil appeals from Scotland. Both in its legislative and in its judicial capacity, Parliament was overwhelmingly English in composition and outlook, and at times this implied anti-Scottish. This fact was to have important consequences for Scottish law, and to some extent made it possible to circumvent the fundamental constitutional safeguards of the Scottish Courts and legal system as laid down in the Treaty and Act of Union.

English law has tended to influence Scottish Law both by direct and by indirect means, and the effect may be conveniently studied under the following classification.

I. Direct Influences

(a) Statutes of the United Kingdom Parliament

The Parliament of the United Kingdom, which has replaced the Parliaments of both Scotland and England, sits in London, and contains a substantial majority of English members who are, naturally enough, primarily concerned with English interests. Parliamentary draftsmen, moreover, who are entrusted with the task of expressing the intention of the Legislature in United Kingdom statutes, have for the most part re-

ceived professional training in English law only, and are not familiar with either the theory or terminology of Scottish law. It would be surprising in these circumstances if English legal ideas had not been introduced into Scottish law both intentionally and *per incuriam* through legislation.

It is relatively rare for the Legislature to abrogate expressly a rule of Scottish law and replace it with the equivalent English rule, except in the course of consolidating a chapter of the law when there is a measure of give and take between the two systems. There have, however, been exceptional instances of direct anglicization by statute. Two examples must suffice, one dating from the time of the Union, and one of modern date. By the Treason Act, 7 Anne c. 21, the English law of treason was made applicable to Scotland in place of the existing Scottish law; but, despite the request made by the Scottish peers that a statement of the English treason laws should be annexed to the Act, this was not done. The English treason law then and now rests substantially on a statute of 1351 which, drafted for a feudal society, has been adapted by highly technical judicial interpretation to meet the needs of a constitutional state. As recently as 1946 the English judges had to consider whether an alien resident abroad in time of war retained his allegiance, and therefore his liabilities under the British law of treason, by reason of holding a British passport.[1] It is apparent that the task of Scottish judges in applying such an uncertain law would be unenviable; and, after the unsatisfactory efforts made to apply the English treason law in Scotland in 1820, the practical solution has been reached that in Scotland the Crown no longer prosecutes treacherous conduct on an indictment for treason.

A modern example of direct anglicization—which has added unnecessary confusion to the law—is the imposition on Scotland of the English law of "charities" for the purposes of income tax. In *I.R. v. Glasgow Police Athletic Association*,[2] the House of Lords (construing the Finance Act, 1921 S. 30 (1) (c) as amended by Finance Act, 1927, S. 24) held that the Legislature intended the words "charitable purposes" to have in Scotland the highly technical meaning which that term has in English law, and that what was English law must now be regarded as British law. Here again the Scottish courts have expressed their dismay at having to predict, without the possibility of expert guidance on English law, how an English Chancery judge would construe in any given circumstances the preamble to the Statute of Elizabeth of England (43 Eliz. c. 4) passed in 1601, and subjected since then to elaborate and variable judicial construction. The House of Lords has stated that this is what the Legislature in-

[1] Joyce v. D.P.P. [1946] A.C. 347.
[2] 1953, S.C. (H.L.) 13; [1953] A.C. 380.

tended, and one must accept the position by faith if not by conviction. It is curious, however, that hitherto, when United Kingdom statutes on other branches of the law have used expressions which have an ordinary, popular meaning and also a technical meaning in English law, the Scottish courts, with the approval of the House of Lords, have followed the practice of construing the statute so as to give the words their ordinary, popular meaning in Scotland.[3]

While anglicization by statute as just described may justly be deprecated, in other cases—as where aspects of British mercantile law have been consolidated in carefully drafted statutes after mature deliberation of specialties in Scottish and English law—many of the English rules incorporated in such legislation have proved beneficial. Indeed, it may be thought that in questions of mercantile law—which is largely based on international practice—it is desirable to have uniformity of law, and that Scottish law has accepted with advantage many of the rules formulated by very able and experienced English judges and later given statutory form.[4] The Sale of Goods Act 1893 may be quoted as an example. As Sir M. D. Chalmers, the draftsman of the Act points out:[5] "So far as England is concerned, the conscious changes effected in the law have been very slight. . . . As regards Scotland, in some cases the Scottish rule has been saved or enacted for Scotland, in others it has been modified, while in others the English rule has been adopted. . . . Scottish law differs from English law mainly by adhering to the Roman law in matters where English law has developed a rule of its own."[6]

A less obvious statutory influence on the principles of Scottish law may be discerned when Parliament provides by legislation for the regulation of some new situation which affects both Scotland and England—for example the nationalization of certain industries or the welfare or adoption of children. Such measures inevitably affect the general law of contract, land-ownership, personal status, succession, and so forth. Only too often statutes are drafted with a view to their application and effect in England. The method and measure of their application to Scotland is then set out in an application section at the end—which is not infre-

[3] See also by the present writer, "Two Scots Cases," 69 L.Q.R. (1953) 517.

[4] The English law in this field was, of course, developed on a broader basis than other branches of the common law, and owed much to the general practice of merchants.

[5] Introduction to Chalmers on the Sale of Goods Act 1893.

[6] Earlier efforts in this field were not so fortunate, and of the English and Scottish Mercantile Law Amendment Acts of 1856 Chalmers observes, "The result was curious. Either by accident or design certain rules were enacted for England which resembled, but did not reproduce, the Scotch law, while other rules were enacted for Scotland which resembled, but did not reproduce, the English law."

quently obscure in its effect, and implies the English solution unless otherwise expressly stated. This device has caused much inconvenience and perplexity to those who have to construe such acts in Scotland, and, accordingly, spokesmen for the Scottish legal profession made representations to the Royal Commission on Scottish Affairs last year (1953) that in appropriate cases separate statutes should be drafted for Scotland and England. The difficulty has been well put by Lord Sorn in *Wauchope Settlement Trustees v. National Coal Board*[7] when discussing the construction of the Coal Industry Nationalization Act 1946: "But when I look at this particular Act and the way it is expressed, I think it is regrettable that, if Parliament wishes to follow this policy, it should not say so in a more easily understood way. Here we have to dig the intention out of a postscript applying the Act to Scotland. . . . A Scottish lawyer, like everyone else, has to try and gather the intention of a statute as he reads it, and it is not altogether surprising to me that the petitioners were misled." The Royal Commission on Scottish Affairs, in a Report published this year, has (in pages 93–94) recommended appropriate reforms.

(b) The Appellate Jurisdiction of the House of Lords

It will be recalled that, though the Treaty of Union safeguarded the integrity of Scots law and the Scottish legal system, it did not deal at all with the competency of appeals from the Scottish Courts to Parliament. On rare occasions prior to the Union of 1707, appeals had been taken from the Court of Session to the Three Estates of the Scottish Parliament. Shortly after the Union, the experiment was attempted of taking an appeal from the Court of Session to the House of Lords as the judicial organ of the new United Kingdom Parliament. The House of Lords—which was overwhelmingly English in its membership—upheld its own jurisdiction, and ever since that time appeals in civil causes—but not in criminal causes—have been competent from the Scottish Courts to the House of Lords. Prior to 1876, in which year provision was first made for a Scottish peer with legal qualifications to assist at the hearing of appeals, the lawyers who participated in the decisions of the House of Lords were trained only in English law. It was indeed a paradoxical situation that the ultimate decision on any point of Scottish civil law lay with men who, with rare exceptions, had never studied Scots law in their lives until they entered the House of Lords. Though some English Chancellors, like Lord Eldon, acquired a considerable knowledge of Scottish law, it is not surprising that most of the English judges in the House of Lords in reaching their decisions in Scottish appeals have spoken in English terms of art

[7] 1948 S.L.T. 156, at p. 158.

and sought—as it were by interpretation—to transpose the Scottish problem into the equivalent English one, and then to propound the English solution. The onus has at times been cast upon counsel—who have seldom been expert in both systems of law—to show that the Scottish law specifically diverged from English law on the matter under consideration. The whole question of House of Lords jurisdiction in Scottish appeals has been fully and frankly—and somewhat caustically—discussed by Professor A. Dewar Gibb, Q.C., in his book *Law from Over the Border*.[8] He shows that the introduction by the House of Lords of English solutions into Scottish law through Scottish appeals has frequently been achieved by the following process of reasoning. The solution in English law is to a certain effect; this solution is reasonable and just in the view of the English members of the House of Lords; it must therefore be the solution of all civilized nations; if the law of Scotland is to be regarded as the law of a civilized nation, it must clearly therefore conform to the English solution. It is material to note that in their zeal for comparative jurisprudence their Lordships have seldom explored the law of other countries such as France, Italy, Germany, or the Netherlands. Associated with this tendency to translate a Scottish problem into English forms, has been that of the House of Lords to overlook the fact that in Scotland there has been no separation of law and equity. Accordingly, from time to time the House of Lords has applied in a Scottish appeal the rule which would have been appropriate in the English common law courts, but not in Equity, and this has become in consequence the law of Scotland. The paradox has occasionally resulted that, since the Judicature Acts 1873–75, the House of Lords in an English appeal has allowed the rule in equity to prevail—thus permitting the supersession of the narrower common law view so far as England is concerned. Meanwhile, Scottish law may remain subject to the discarded narrow common law rule which had been laid down as one of "general jurisprudence."

Since 1876 the position has, of course, been greatly improved in that since that time one or two Scottish Lords of Appeal have sat in the House of Lords to give guidance on questions of Scots Law. These sit in London at present, and spend most of their judicial time in the House of Lords and Privy Council dealing with questions of English law. For example, in 1953 the House of Lords heard only three Scottish appeals.

Over a century ago[9] Lord Cockburn raised what he described as two "unanswerable" objections to the proposal to send Scottish judges to the House of Lords on a permanent basis—first, that "the transplanted

[8] Green, Edinburgh, 1950.

[9] In 1852—Cockburn's Journal (1874, Vol. II., 278).

Scotchman *must* lose his Scotch law. Nothing oozes out of a man so fast as law;" and, secondly, that there was no security that the fittest men would always be chosen for appointment to the House of Lords. Cockburn considered that the House of Lords should be reinforced with Scottish judges from Edinburgh when required for Scottish appeals. Certainly it is not self-evident that the interests of Scotland's law are best served if two of her ablest judges are removed to London, where they will relatively seldom be deciding Scottish legal questions; and appointment to the House of Lords—involving as it does a move from Edinburgh to London —does not necessarily hold the same attraction for a Scottish as for an English judge. On the other hand, when a United Kingdom statute or other question of law common to Scotland and England arises in an English appeal, there are obvious advantages in having Scottish representation on the supreme appellate court. It may be observed that Cockburn's apprehensions that "the transplanted Scotchman *must* lose his Scotch law," though exaggerated, has its element of truth, and it may be remarked that a number of English doctrines of very doubtful value have been imposed on Scottish law largely due to the specially powerful position which Scottish Lords of Appeal enjoy in the House of Lords when advising a majority of English judges on Scottish law. Gibb has described Lord Watson as "that doughty anglicizer;"[10] Lord Robertson (a former Lord President of the Court of Session) was responsible for fastening on Scottish law several alien doctrines such as the English rule that if the family of a tenant is injured by the defective state of premises, they can have no remedy in delict against the landlord[11] following the English rule in *Cavalier* v. *Pope*;[12] and even Lord Dunedin, who stands in a class by himself as a Scots lawyer, fastened on the Scottish law of liability for defective premises the unsatisfactory and rigid English categories of "invitee, licensee, and trespasser."[13] A false step taken in the House of Lords unfortunately settles the law unless the Legislature intervenes. There is no machinery, as in the Court of Session, for setting aside bad precedents of law expressed in an earlier decision.[14] It has not been expressly decided that this rule must apply in Scottish appeals,[15] but it is doubtful if the Upper House would apply a more liberal rule in such cases.

[10] Law from Over the Border, p. 90, and see, e.g., Bradford v. Pickles, [1895] A.C. 587 at p. 597/8.

[11] Cameron v. Young, 1908 S.C. (H.L.) 77.

[12] [1906] A.C. 428.

[13] Dumbreck, v. Addie, 1929, S.C. (H.L.) 51.

[14] London Street Tramways v. L.C.C. [1898] A.C. 375.

[15] See, T.B. Smith, Doctrines of Judicial Precedent in Scots Law (1952) 104.

In justice to many distinguished Lords of Appeal (English and Scottish) who have delivered opinions in Scottish appeals, it must be freely acknowledged that Scottish law has often been enriched by decisions of the House of Lords. Indeed, the evidence given in 1953 to the Royal Commission on Scottish Affairs on behalf of the Faculty of Advocates and of the Law Society of Scotland was in favour of retaining the right of appeal from the Court of Session to the House of Lords—though the larger branch of the legal profession urged that their Lordships should sit in Edinburgh to hear Scottish appeals. Such appeals are not numerous, and such a reform would have certain obvious advantages—economy, the availability of Scottish judges for consultation, and the general desirability of having Scottish appeals heard in Scotland by a predominantly Scottish court. The Report of the Royal Commission—a somewhat timid document—evaded comment on this matter (pars. 102–103).

II. Indirect Influences

(a) Citation of English precedents to Scottish Courts in cases ostensibly in *pari materia*

Professor David Walker[16] has calculated that since Hitler's war approximately one quarter of the annual total of precedents cited in the Court of Session originated in the English courts, though many of these have long since been naturalized, and a good number merely illustrate the application of principles long recognized by the Scottish courts—but, it may be, are expressed with particular felicity in a passage from an English report. By far the greater part of these English precedents are decisions of the present century dealing with legislation applicable to both countries. It may be added, of course, that, though many cases are cited, few are chosen to influence the actual decision, and a statistical statement of the proportion of English to Scottish case citations cannot justify firm conclusions as to the extent to which English law influences Scottish law. Moreover, where the question in issue is one of interpretation of a United Kingdom statute, e.g. a Factories Act, it is largely immaterial whether the Scottish or English courts are first confronted with the circumstances calling for decision.

Since there is a common court of appeal from the supreme courts of England and of Scotland to the House of Lords, it is natural enough that, when the English courts have pronounced upon a problem which later arises in Scotland, the English solution will in many cases be listened to with respect. English law reports are generally available in the principal

[16] David M. Walker, "A Note on Precedent," 61 Jur.Rev. (1949) 283.

towns throughout Scotland, though it is thought that relatively few English practitioners have ready access to the Scottish reports. The citation of English precedents was at one time most unpopular in the Court of Session, but in recent years has become a common and accepted practice in certain branches of the law—especially in mercantile law, where there has been substantial assimilation of the law of the two countries.

The danger of indiscriminate citation of English cases is that Scottish practitioners and judges who have not studied English law may not fully understand the effect of an English precedent. In particular, it is thought that very few appreciate the effect which the separation of law and equity has had on English law. Thus, the English case of *Kennedy v. Panama Mail Co.*[17] has several times been quoted in Scottish cases on "essential error" without an appreciation of the fact that, since the Judicature Acts 1873–75, the English courts would give a remedy on grounds of "innocent misrepresentation" in circumstances where the common law remedy for "mistake" was not available, and, therefore, a decision dating from 1867 is of doubtful reliability. In short, English precedents can be —and very often are—most valuable and helpful; but they may be a positive danger to the principles of Scots law when used out of their proper context. There is possibly no fallacy more prevalent in the administration of justice in Great Britain today than that *because* the laws of Scotland and England would both grant a remedy on particular facts, *therefore* the particular rules of law in the two countries derive from the same premises. The consequences of such a misunderstanding often only become apparent when it comes to extending a precedent to new sets of circumstances. Thus, for example, it was readily assumed in the well-known case of *Donoghue v. Stevenson*,[18] that the laws regarding negligence in Scotland and England were identical. *Culpa* or negligence in Scottish Law comprises virtually all aspects of unintended wrong-doing (except possibly nuisance). It is doubtful if the Scottish counsel who made the concession in *Donoghue* realized that in England there was both then and since a considerable controversy as to whether there is an English law of tort or of torts, and as to whether there was in England a specific "tort" of "negligence." It is becoming apparent that *culpa* and the English tort of negligence are by no means identical.[19] So far as the citation of English cases in Scottish legal treatises is concerned, there is an obvious danger in quoting too many English decisions. It is thought that

[17] (1867) L.R. 2 Q.B. 580.

[18] 1932, S.C. (H.L.) 31; [1932] A.C. 562.

[19] McPhail v. Lanarkshire C.C., 1951 S.C. 301; Horton v. London Graving Dock Co., [1951] A.C. 737, and see *loc. cit.* n. 30 *infra*.

these should be cited very sparingly, and only when no Scottish authority is relevant. The English law can best be studied for comparative purposes in the leading English textbooks.

(b) Citation of English Legal Literature

Since the beginning of the 19th Century there has been no institutional work of authority written in Scotland. It follows that Scots law has been developed since then mainly by statute law and case law. The various developments call for systematized statement in legal textbooks. Now, the market for legal works in Scotland is relatively small, and their cost is high. The writing of legal treatises in Scotland is a work of piety and not of profit. In consequence, new editions cannot be published frequently, even were authors and editors readily available for the task. The impact of the recent war on a profession which is, compared with England, small, has affected the output of legal literature; and at the present time, though the situation is improving, several fields of the law are not covered by up-to-date Scottish legal works of authority. The English legal profession, on the other hand, with its vastly greater numbers, especially in the academic field, has never suffered from a shortage of willing and able writers, even during wartime. In fields of law where there is—or is believed to be—substantial common ground between the Scottish and English solutions, English legal treatises and legal journals are frequently referred to both in court and in Scottish legal works. Obvious examples are the English works on tort, which are frequently cited in Scottish cases on negligence; English works on company law, sale of goods, agency, insurance, damages, and income tax. Many of these works cite the leading Scottish decisions. The profession in Scotland owes a considerable debt to English legal literature, and in some chapters of the law relies on it continually. As with reliance on English precedents, English legal treatises can most safely be used by those who are aware of the fundamental divergences of the two legal systems. Where such divergence is not appreciated, then English law may exercise an influence on the law of Scotland which is inconsistent with its basic principles. This is certainly the case regarding some aspects of the law of delict.

(c) English legal education of members of the Scottish legal Profession who have studied law in Scotland and England

Whereas in the past it was the practice of Scottish lawyers who intended to practice at the bar to study at the law schools of the continent, since the Napoleonic Wars the convention of foreign study has not been revived. This is, of course, in part because better facilities for legal educa-

tion have been offered in Scotland. Since, however, an Intrant to the Faculty of Advocates in Scotland normally requires an Arts degree before taking his Scottish legal qualification, it is not infrequent for prospective advocates to take an arts degree at Oxford or Cambridge before studying for their Scottish legal qualification. Since such a degree may be taken in the laws of England, a certain number of the Scottish Bar—as of the South African Bar—have experience of English law before they come to study their own system. Moreover, a substantial proportion of those who teach in the law faculties of the Scottish Universities have studied at some time South of Tweed. It is certainly an advantage for a Scottish lawyer, especially if he is a law teacher, to appreciate the achievement of the English common law, and a general knowledge of English law should enable a practitioner to avoid confusing the principles of Scottish and English law. It is possibly significant that the most doughty opponent of uncritical anglicization is Professor Dewar Gibb of Glasgow, who formerly lectured in Scots law at Cambridge. On the other hand, English influence has gained undue prominence in certain aspects of Scottish university teaching, and a training in English law may incline the Scottish practitioner to show a reverence for precedent which is inconsistent with the tradition of Scottish law. There is a lectureship in Scots Law at Cambridge, and leading exponents of comparative law, such as Professor F. H. Lawson at Oxford and his colleagues in English law, Professors Hanbury and Hart, take an interest in Scottish law for comparative study. The principles of Scottish law are, however, seldom studied seriously by English practitioners.

(d) Use of common language

Another somewhat obvious reason for the influence of English law in Scotland today is the use of a common language. Even while Scots was the spoken language of the Scottish courts, the written language was English. Until the Napoleonic Wars the Scottish law students who studied abroad had to be familiar with Latin, and with at least one of the continental languages. This is regrettably no longer the case, and it would be rash to assume that citations from the *Corpus Juris*, from the Voets, or from the works of Pothier or Domat would be readily understood in the original tongue by every member of the Bench and Bar. It is possibly not surprising, in the circumstances, that researches in comparative law for the Scottish practitioner since the early 19th Century have been most frequently pursued in authorities and treatises expressed in the English language—of which the most accessible are in fact English, though American and Dominion works are also consulted to a lesser extent. It is pos-

sible that a language barrier acts to some extent as a safeguard against assimilation by another system which predominates in the judiciary of a common supreme appellate court. The experience of Quebec and South Africa—where the French, Dutch, and Afrikaans languages retain their importance in the administration of justice—as well as of Louisiana—where the French is no longer generally used—would be instructive on this point.

Notes on the Influence of English Law on Various Divisions of Scots Law

(1) *Constitutional Law.* The influence of English law in the field of constitutional law has been considerable since the Union, especially in questions which affect the United Kingdom as a whole. Thus, the practice of the British Parliament which superseded the Scottish and English Parliaments at the Union is modelled on the English tradition. The English concept of absolute Parliamentary sovereignty was no part of Scottish constitutional law, and is not accepted by the Scottish judges as valid in Scotland today (*McCormick v. Lord Advocate*).[20] Scottish law, moreover, did not accept the doctrine that "the King can do no wrong," but in *Smith v. Lord Advocate*[21] the English rule was imported—though since the Crown Proceedings Act 1947 the English rule has itself been substantially set aside. One aspect of the English doctrine which the Act preserves is that interdict (in England "injunction") is not available against the Crown, though this remedy had previously been recognized as competent in Scotland. Since the Union, the fundamental law taken by British settlers overseas has not been their personal law but English law—even in those parts of North America and of New Zealand such as Glengarry and Dunedin which were settled by Scottish communities which migrated after the Union. Had the Scottish law been established in regions of America at the time when Roman influences predominated in Scotland, the affinities which Scottish law then had with French law in Europe might well have been developed later in the New World with systems such as those of Quebec and Louisiana. Whether in these circumstances the English common law would have prevailed in North America to the extent that it has may be questioned.

Military law, both substantive and adjective, as set out in the Army Act 1881, is substantially English law, and by S. 41 (5) a British soldier, even though not English and even while he is serving abroad, may be punished for offences which would be punishable under the law of Eng-

[20] 1953 S.C. 396; 1954 S.L.T. 255; discussed 69 L.Q.R. (1953) 512; *loc. cit.* n. 3, *supra.*
[21] 1897 25 R. 112.

land. Clearly it would be impossible to administer "personal law" in the Army, but the argument that the soldier voluntarily accepts the law as set out in the Army Act cannot be supported in the case of national servicemen. For two years of their lives Scotsmen fit for military service are obliged to subject themselves to what is fundamentally the English criminal law.

In domestic matters Scottish constitutional law does not reflect the same degree of English influence. Thus, the spiritual autonomy of the Established (Presbyterian) Church is guaranteed; Royal Assent is not required for the legislation of the General Assembly of the Church of Scotland; *habeas corpus* does not run in Scotland, where the liberties of the subject are safeguarded by other means; and the independence of the judiciary is secured by treaty and statute.

(2) *Criminal Law.* The graver crimes in Scotland rest on common law and not upon statute. Accordingly—except for the crime of treason[22]—there has been little English influence through legislation. So far as lesser offences are concerned, both Scotland and England come within the scope of the many orders and regulations which control the national life and economy. In these, few questions of principle are to be found. Since no appeal lies to the House of Lords in criminal causes, there is not the same tendency as in questions of civil law for the Scottish and English law to converge, nor for English solutions to be forced on the Scottish system. Thus the Scottish courts have been able to maintain more liberal doctrines than those recognized by the House of Lords for England in matters such as definition of murder, provocation, insanity, diminished responsibility, and cross-examination of an accused as to previous bad character.[23] English precedents and passages from legal textbooks are cited in appropriate cases as persuasive authority, and may be adopted on their merits as a result of comparative examination. This kind of legal influence, whether that of England or of any other native system, is always acceptable, and should never give rise to confusion or resentment. Hume, the main Scottish institutional writer in the field of criminal law, freely acknowledged the value to Scottish criminal law of a study of English criminal jurisprudence.[24]

(3) *Persons.* Scottish and English law contrast in their attitude to the

---

[22] See *supra* at 526.

[23] The main points of contrast are mentioned by the present writer, "Capital Punishment. A Scottish Commentary on the Proceedings of the Royal Commission," 1953 S.L.T. (News) 197; 12 M.L.R. 515; also Doctrines of Judicial Precedent in Scots Law (1952) 63–66.

[24] 1 Commentaries on the Law of Scotland Respecting Crimes (1st ed. 1797) Introduction *passim*.

legal capacity of children under the age of twenty-one. In England, infancy with its consequent incapacities continues until twenty-one. In Scotland a minor (female over twelve and male over fourteen) may enjoy very considerable legal capacity—as for example to make a will of moveables, to marry without parental consent, to choose his residence against the wish of his curators, or to contract (the extent depending on whether the minor has curators or not). Certain United Kingdom statutes drafted primarily for application in England have, however, been superimposed on Scottish law in such matters as custody, maintenance and welfare of children; and it is at times difficult or impossible to reconcile such legislation with the status of minor recognized by the Scottish common law.

The Scottish and English laws of marriage and divorce formerly diverged widely, but were brought closer together by legislation in 1937–1939. There are still very substantial differences between the two systems.[25] At present a Royal Commission on Marriage and Divorce, presided over by Lord Morton of Henryton, is considering further alteration to the law of both countries. There has been a tendency in the House of Lords to further the process of assimilation in some respects.[26] It is thought, however, that the House of Lords has at times somewhat exaggerated the extent to which the two systems do in fact correspond—e.g. in the construction of "cruelty."[27]

(4) *Reparation* (*Delict and Quasi-Delict*). The Scottish law of reparation is derived from broad principles of liability for injury sustained through *culpa* or fault wherever there is a lawful interest to be protected. On the other hand, the English law of torts has evolved from various forms of action appropriate to particular types of harm. Nevertheless, it is undoubtedly the case that the English law has had a substantial influence on the Scottish law of reparation during the past century—especially in respect of unintended wrongdoing. The interaction of the two systems seems to have had the result of broadening the English law of torts, while the broad principles of the Scottish law of reparation have been overlaid with certain restrictive categories of English derivation. In the field of negligence, Scottish and English authorities are readily exchanged,

---

[25] See by the present writer, "Comparative Observations on Scottish and English Consistorial Law in 1952," 69 L.Q.R. (1953) 30; "Capital Punishment. A Scottish Commentary on the Proceedings of the Royal Commission," 1953 S.L.T. (News) 197; "The Durability of the Scottish Legal Tradition," 1950 Jur.R. 1, esp. 12 *et seq.*

[26] See e.g., Jamieson v. Jamieson, 1952 S.C. (H.L.) 44; [1952] A.C. 525; Lennie v. Lennie, 1950 S.C. (H.L.) 1; Thomas v. Thomas, 1947 S.C. (H.L.) 45; [1947] A.C. 484.

[27] Jamieson v. Jamieson, *supra*.

and a number of leading House of Lords decisions, such as *Donoghue v. Stevenson*[28] and *Bourhill v. Young*,[29] carry as much authority in one country as the other though on neither side of the Border is it always appreciated that the English "tort of negligence" is much more limited than the broad Scottish concept of *culpa*.[30]

The leading English textbooks on tort and negligence are in daily use in the Scottish courts, and it may be readily admitted that there is no modern work on the Scottish law of Reparation which has come up to the measure of "Salmond" or "Winfield." By their excellence English textbooks have had a substantial influence on the development of the Scottish law of reparation.

The English influence on the Scottish law of reparation for negligent wrongdoing is apparent in at least four respects. First, the confusion between contractual and delictal liability which led to the English decision in *Cavalier v. Pope*,[31] was extended to Scotland by the House of Lords decision in *Cameron v. Young*[32]—so that the family of the tenant of property are barred from suing the landlord for reparation if they are injured through his culpable negligence in relation to the premises. Though both these decisions are generally condemned, the Court of Session cannot overrule the House of Lords decision. A similar fallacy of reasoning in relation to moveables which had gained some acceptance was eliminated by the House of Lords in *Donoghue v. Stevenson*.[33] Secondly, the English law which classifies rigidly the duties owed by an occupier of land or premises to persons entering thereon—according to whether these are "invitees, licensees, or trespassers" has been imposed on Scotland in *Dumbreck v. Addie*.[34] No such classification was known to Scottish law in the 19th Century, and even a trespasser might in certain circumstances recover in respect of injury to him which the occupier should have foreseen. The rigid English categories have not been accepted without criticism, nor does it in practice prove easy to apply them in all circumstances.[35] It may be observed that Scottish law, unlike English law, does not measure by these categories the duty of care owed by those in control of vehicles.[36]

---

[28] 1932 S.C. (H.L.) 31; [1932] A.C. 562.

[29] Hay or Bourhill v. Young, 1942 S.C. (H.L.) 78; [1943] A.C. 92.

[30] See W. A. Elliott, "Reparation and the English Tort of Negligence," 64 Jur.Rev. (1952) 1 and James G. Gow, "Is Culpa Amoral?" 65 Jur.Rev. (1953) 17.

[31] [1906] A.C. 428.

[32] 1908 S.C. (H.L.) 7.

[33] *Cit., supra*, n. 18.

[34] 1929 S.C. (H.L.) 51.

[35] See McPhail v. Lanarkshire C.C., 1951 S.C. 301.

[36] Carney v. Smith, 1953 S.C. 19, especially per Lord Mackintosh.

The third influence of English law on the Scottish law of reparation for *culpa* is the introduction of the concept of a "particular duty" of care owed by the defender to the pursuer—instead of measuring, as formerly, the degree of care owed by what would be reasonable in the circumstances generally. This is a curious development, especially if the late Sir Percy Winfield's explanation is accepted as to how the concept of "particular duty" emerged in English law.[37]

Fourthly, there is the alleged acceptance in Scotland of the principle of strict liability for dangerous agencies declared in *Rylands v. Fletcher*.[38] Whether the principle of this English case does apply in Scotland may be debated, but it is at least clear that Scottish courts would not give it the wide application which it is given in England, and have tended on the whole to consider the case as an authority on *culpa*.[39]

Apart from the mutual influence of Scottish and English law in questions of liability for negligence, there is reciprocal citation of authorities on such topics as nuisance, defamation, and conspiracy—though, particularly in defamation, there are substantial differences between the two systems.

(5) *Contract*. There are certain similarities between the Scottish law of contract and that of England; but there are also important and fundamental differences, as might be expected from their very different origins. Thus Scottish law, giving effect to all lawful pactions which can be proved, rejects the test of "consideration," which English law regards as the badge of concluded agreement; and accepts the doctrine of *jus quaesitum tertio*, which English law repudiates.

The Scottish law of "essential error" has been reduced to a state of confusion through the citation of English authorities on "innocent misrepresentation" and "operative mistake." The term "essential error" in Scots law (which knows no dichotomy between law and equity) applies to situations covered by both these concepts of the English system—the one derived from "equity," the other from "common law." The recognition of "innocent misrepresentation" as a separate category—if such recognition is in fact well founded in Scottish law—is clearly due to English influence, though, before that doctrine was fully evolved in England, somewhat similar results had been achieved in Scotland by a wide interpretation of "essential error" and the operation of personal bar (*anglicé* "estoppel"). Prior to the intervention of the House of Lords in 1830–31 (when no Scottish judges sat to assist that exalted tribunal) it was the better view in Scotland that money paid through error in law

[37] "Duty in Tortious Negligence," 34 Columbia Law Review (1934) 41.
[38] (1868) L.R. 3 (H.L.) 330.
[39] Miller v. Addie, 1934 S.C. 150; McLaughlan v. Craig, 1948 S.C. 599.

might be recovered. This view was rejected *obiter* in two successive appeals in the House of Lords, when their Lordships applied the English common law doctrine.[40] It is therefore of some interest to note that a recent English decision seems to recognize that in equity it may be possible to secure repayment of monies paid under mistake in law.[41] This seems to be a possible example of Scotland being saddled by English law with a doctrine which England itself has now been able to discard since the fusion of law and equity.

The doctrine of "undue influence" in contract, so far as it is received in Scottish law, is also clearly due to English Chancery doctrine.

The majority of leading cases dealing with "frustration of contract," as Lord Macmillan pointed out in *James B. Fraser v. Denny Mott & Dickson*,[42] have been English cases. Though there has been substantial harmony between Scottish and English law on this aspect of contract law, which has acquired great importance in recent years, certain dicta in the English case of *British Movietone News v. London Cinemas*,[43] if followed closely, would override the traditional Scottish approach to the problem. This approach—which was well stated by Lord Wright in the earlier case cited—is that of making equitable adjustment by judicial decree when one party to a transaction has been enriched unintentionally at the expense of the other party.[44] Questions of frustration fall within the scope of this broader principle. It is possible that English influence and the suggestion that questions of frustration are of "general jurisprudence" may supersede the older tradition of Scottish law.

So far as mercantile transactions are concerned, it is roughly true to say that there has been statutory unification of much of the commercial law of the United Kingdom. English influence predominated in the drafting of this statute law, but in certain respects the specialties of Scots law have been expressly maintained. The notable contribution to mercantile law made by the English judges of the time of Lord Mansfield had already been recognized by the last of the Scottish institutional writers—Professor George Joseph Bell—who wrote at the beginning of the 19th Century. He was the first Scottish writer to make extensive use of English decisions on mercantile law. Today, as has been observed,

---

[40] Wilson & McLellan v. Sinclair, 1830 4 W. & S. 398; Dickson v. Monklands Canal Co., 1831, 5 W. & S. 445 (where somewhat offensive language was used by Lord Brougham in particular).

[41] See Minister of Health v. Simpson, [1951] A.C. 251.

[42] 1944 S.C. (H.L.) 35 at p. 41.

[43] [1952] A.C. 166.

[44] See Lord Cooper, "Frustration of Contract in Scots Law," 28 J. Comp. Leg. (1946) Part 3, 1.

statutory form has been given to mercantile law, and in questions of its judicial interpretation, it is natural that the English courts should still continue to exercise a substantial influence in Scotland, since the volume of commercial litigation in England is proportionately higher than that which comes before the Scottish courts. Likewise, leading treatises like Buckley or Palmer on the Companies Acts, MacGillivray on Insurance, and similar works, are freely and gratefully used in Scotland.

(6) *Property, Trusts, and Succession.* The Scottish land law remains fundamentally feudal in theory, and English influence may be discounted for the most part. Again, the Scottish law regarding corporeal moveables owes much to the law and categories of Rome, but little to the English common law. A number of citations of doubtful value regarding doctrines of possession derived from English law have appeared in Scottish treatises. It is suggested that these should be treated *cum nota*. The Scottish trust seems to be a native product, but in certain matters the developed doctrines of the English equity lawyers have had their effect in elaborating Scottish trust law. The Scottish law of succession leaves relatively little scope for the citation of English authority, though certain doctrines, such as that of "vesting subject to defeasance," have an English origin.

(7) *Adjective Law.* Scottish civil and criminal procedure are substantially different from those of England, and here English law has had relatively little effect. A notable exception, however, is civil trial by jury. This was imposed on Scotland in 1815 at the instigation of the House of Lords, which was accustomed to the procedure of fact-finding by jury which prevailed in England. Accordingly, a jury court was set up in Scotland, which subsequently merged in the Court of Session, and heard particular types of cases—of which the most numerous category today is the action for injuries caused by negligence, whether of vehicle-driver, or factory, or shopowner, surgeon, or doctor. It is a matter for reflection that the "running down" case in England is now normally tried by a judge sitting alone—while in Scotland the jury which was imposed from England still continues in regular use for this speculative type of claim. The paradox is not a welcome one. It is possibly a matter for relief that Lord Eldon did not also succeed in splitting Law and Equity in Scotland.

The effect of the English law of evidence on that of Scotland is apparent. There are, however, important differences as, for example, in the Scottish requirement of corroboration as a general rule, and strict rules restraining pretrial publicity and interrogation of suspects.

The doctrine of "*stare decisis*" in a modified form has been introduced into Scottish law through English influence; and the current tendency

is towards a reverence for precedent which would have surprised the Scottish judges of the 19th Century.[45]

Conclusion

The independence of the Scottish legal system is guaranteed by the fundamental law of the British constitution, and has considerable symbolic importance in addition to its inherent merits. A characteristic quality of those who have built up Scottish law has been the capacity to benefit from a study of other legal systems, and to blend foreign concepts with the existing law. A small country can seldom find within her own limits such diversity of experience and range of endowed research as may be expected in larger and richer countries. It is therefore wise to benefit by the lessons which can be learned from such countries. In the past this has been the view of Scottish practitioners and writers, but conscious resistance to external influence has now to some extent developed in Scotland as a reaction against the imposition *ab extra* of English legal doctrines. On the other hand, Scottish lawyers have possibly been less grateful than justice demands for the help which they have received from English influences. Part of the influence of English law upon the Scottish system has been highly beneficial, part is on probation, and part has been definitely detrimental to Scottish principles. The detrimental influences have seldom been introduced by the comparative method. Since Hitler's war, there has been a revival of traditional Scottish legal contacts with the Continent, and also with learned lawyers from more distant lands. It is indeed most desirable that, while considering with respect the contributions to legal thought of the Law from over the Border, Scottish lawyers should not overlook the rich resources of the Law from over the Water.

---

[45] (See this problem more fully discussed by the writer in his book *Doctrines of Judicial Precedent in the Law of Scotland.*)

Comments

THE UNITED NATIONS DRAFT CONVENTIONS ON MAINTENANCE CLAIMS

The Economic and Social Council of the United Nations at its nineteenth session to be held in March, 1955, is expected to consider the question of the recognition and enforcement abroad of maintenance obligations. The Council will then decide whether to convene a conference of plenipotentiaries for the purpose of completing the drafting of a Convention on the Recovery Abroad of Claims for Maintenance. The adoption of a convention by a diplomatic conference would bring to a conclusion the efforts made on this subject by international organizations during the last thirty years.

It has long been recognized that it is exceedingly difficult for dependents to enforce their right to maintenance against a debtor who has moved to another country and is unwilling to fulfill his obligations.[1] Before the second World War, this situation affected mainly wives and children of men who, having emigrated to another country, ceased to support their families. The International Association for the Protection of Children and the International Migration Service were the first organizations to concern themselves with the problem of finding legal means to assist abandoned families in securing support from their breadwinners abroad. In 1929 the League of Nations referred the matter to the Rome Institute for the Unification of Private Law. The Institute, after considerable research, appointed a Committee of Experts who drew up a preliminary Draft Convention in 1938. The work was interrupted by the war.

The magnitude of the problem has greatly increased during and after the second World War because of the family separations brought about by mass displacements, and the return to their homelands of soldiers who had contracted maintenance obligations in the foreign territories where they had been stationed. The matter was brought before the First and Second Sessions of the Social Commission of the United Nations in 1947, and the Rome Institute was asked to resume its work on the subject. The Institute called another Committee of Experts for the purpose of reviewing the 1938 Draft in the light of the changed circumstances. The Committee prepared a revised Draft Convention in 1949.[2]

[1] These difficulties have been discussed in some detail by various writers. See, e.g. Jacobs, "The Enforcement of Foreign Decrees for Alimony," 6 Law and Contemporary Problems (1939) 250; Gutteridge, "The International Enforcement of Maintenance Orders," 2 International Law Quarterly, (1948) 155–172; Kraemer-Bach, Les Actions Alimentaires en Droit International, Paris (1953); Contini, "International Enforcement of Maintenance Obligations," 4 California Law Review, (1953) 106–123; Lipstein "A Draft Convention on the Recovery Abroad of Claims for Maintenance," 3 International and Comparative Law Quarterly, (1954) 125–134.

[2] International Institute for the Unification of Private Law, Preliminary Draft of a Convention on the Recognition and the Enforcement Abroad of Maintenance Obligations. Doc. 16(1) (1950).

The Rome Institute's Draft Convention

The purpose of the Rome Draft Convention was to facilitate the recognition and enforcement in one country of maintenance orders rendered in another country. Following the pattern of existing treaties on the enforcement of foreign judgments, it provided for the enforcement of foreign maintenance orders on condition that the original court had jurisdiction, that the order was not subject to appeal, that it was enforceable, that in case of a decision by default the decision had been in accordance with the law of the country of the original court, that the order was not inconsistent with a decision given on the same matter and between the same parties in the country of enforcement, and that it was not against public policy.[3] In addition to maintenance orders given by judicial authorities, the Rome draft was made applicable also to consent orders, instruments enforceable without need for an action, and decisions of administrative authorities. Perhaps the most significant innovation was the provision that the authorities of the country where the plaintiff was habitually resident were competent to render a maintenance order. This clause was introduced in order to extend the benefit of the Convention to those categories of claimants, such as dependents of members of foreign armed forces, who would not otherwise normally be able to obtain a judgment against a maintenance debtor after the latter's departure from the country where the obligation was contracted. Other facilities established in the draft Convention included free legal aid, exemption from posting security for costs or *cautio judicatum solvi*, transfer of funds, and, whenever a foreign decision was transmitted through the diplomatic channel, institution of enforcement proceedings ex officio and without cost on behalf of plaintiffs granted free legal aid.

The Secretary-General of the United Nations transmitted the draft Convention to governments and to interested specialized agencies and non-governmental organizations for their comments. Although the majority of the replies were in general agreement with the Rome project,[4] the United States,[5] the United Kingdom,[6] and the Netherlands[7] did not consider it acceptable. The subject was discussed at the seventh session of the Social Commission in April 1951[8] and at the thirteenth session of the Economic and Social Council in August of the same year.[9] On August 9, 1951, the Council adopted resolution 390(XIII) H requesting the Secretary-General, taking into consideration the Rome project and the comments thereon, to prepare a working draft of a model

[3] The draft Convention introduced also a new condition, i.e. that a decision given against a citizen, domiciliary, or resident of the country of enforcement should not be contrary to the law of that country if such law is applicable according to its private international law.

[4] E/CN.5/236 and Add. 2, 3 and 4.

[5] E/CN.5/236, p. 33.

[6] E/CN.5/236 Add.1.

[7] E/AC.39/L.2.

[8] E/CN.5/SR.171 and 172; E/1982.

[9] E/AC.7/SR.184 and 185; E/SR.494.

convention or of a model reciprocal law, or both. The Secretary-General was also requested to convene a committee of experts "with a view to formulating on the basis of the working draft or drafts prepared by the Secretary-General, the text of a model convention or model reciprocal law, or both."

The Secretariat's Working Drafts

Since most abandoned dependents live in countries of emigration and most persons liable for their support have established themselves in countries of immigration, the Secretariat considered it essential to find a system acceptable to both types of countries. The Rome draft did not meet this requirement mainly because one of its cardinal features was not acceptable to the United States and probably also to other countries of immigration belonging to the common law system. This was the clause which, by establishing the competence of the authorities of the country of residence of the claimant, would have enabled dependents to obtain a default judgment against a defendant residing abroad. This type of foreign maintenance order would not normally be recognized by United States courts.[10]

The Secretariat sought to solve the problem by preparing two working drafts envisaged as complementary to one another; the first, called "Model Convention on the Enforcement of Maintenance Obligations,"[11] was substantially similar to the Rome draft;[12] the second, called "Model Agreement on Maintenance Obligations,"[13] followed an entirely different approach, developing a suggestion made by the United States in its comments on the Rome draft.[14] It was an adaptation, on an international scale, of the system of uniform reciprocal support legislation recently developed in the United States.[15]

The Model Agreement was applicable to any person having a right or a duty of support according to the law of the State of residence of the defendant, as it applied to citizens of that State. A dependent would file an application before the competent court in the country of residence of the dependent ("initiating court"). The initiating court, having determined by way of a preliminary finding whether a prima facie case had been made out, was required to transmit the papers to the authorities designated by the country where the defendant resided. The papers were then forwarded to the court having jurisdiction over the defendant (the "responding court") and proceedings for the purpose of obtaining a maintenance order were to be commenced ex officio. The Model

[10] E/CN.5/236 p. 34.

[11] E/AC.39/L.3.

[12] The points of difference with the Rome project are described in the commentary accompanying the Secretariat draft (E/AC.39/L.3, p. 9–16) See also Lipstein, *op. cit.*, p. 127–128; Contini, *op. cit.*, p. 116–118.

[13] E/AC.39/L.6.

[14] E/CN.5/236.

[15] The first reciprocal support laws were adopted by twelve States in 1949. In August of 1954, reciprocal support legislation was in force among forty-seven States and five other jurisdictions.

Agreement contained other facilities similar to those provided in the Rome draft and in the Secretariat's Model Convention.

Projects of the Committee of Experts

The Committee of Experts[16] appointed by the Secretary-General met in Geneva from August 18 to 28, 1952. After a general discussion, the Committee concluded that the existing differences in the legal systems of the various states, would make it difficult either to effect the plan envisaged in the Model Agreement, under which maintenance suits instituted in one State would be concluded in the courts of other States, or to find a generally acceptable formula for a multilateral convention providing for the enforcement of foreign maintenance orders, which moreover would not provide for most cases in which the debtor is abroad. On the other hand, it appeared to the Committee that a simple and effective system of international assistance in such cases could be devised, compatible with the legislation of most states. For this reason, the Committee devoted most of its time to the preparation of a multilateral instrument called "Draft Convention on the Recovery Abroad of Claims for Maintenance,"[17] intended to facilitate bringing actions for support against maintenance debtors abroad.

(a) Draft Convention on the Recovery Abroad of Claims for Maintenance

The Draft Convention is applicable only to ascendants, descendants (including illegitimate and adopted children), and spouses because the Committee thought that the special advantages provided in the Convention should be limited to the closest relatives.

In order to commence the proceeding, the claimant makes an application for maintenance to an agency (the Transmitting Agency) in the State in which he resides or is present (Article 3(1)). The Transmitting Agency, on the basis of the application, the accompanying documents, and the evidence presented at a hearing which may be held if permitted by law, determines summarily whether a case has been made out for transmission abroad (Article 5(1)). The functions of the Transmitting Agency resemble those of the initiating court in the Secretariat's Model Agreement. There is, however, an important difference. The Secretariat draft envisaged a system, whereby a proceeding commenced in one country was completed in another country, while under the Draft Convention States are given considerable freedom in the designation of the Transmitting Agency. The Agency may be a judicial or administrative body; one or more agencies may be set up (Article 2(1)); the functions of the Agency in preparing the papers and transmitting them abroad may be entrusted to separate au-

[16] Prof. E. M. Meijers (Netherlands), Chairman; Prof. H. E. Yntema (United States), Vice-Chairman; Mr. M. Matteucci (Italy), Rapporteur; Mme. M. Kraemer-Bach (France), Prof. K. Lipstein (United Kingdom), Mr. E. A. Saleh (Lebanon), Prof. F. C. de San Tiago Dantas (Brazil), Members.

[17] E/AC.39/1, Annex I.

thorities (Article 2(2)); States are not required to designate a Transmitting Agency, but if no designation is made any authority having the power to render maintenance orders may act as a transmitting agency (Article 2(3)).

If the Transmitting Agency determines that the case should be transmitted, the reasons for such determination, and, where appropriate, evidence of the claimant's need of free legal aid and exemption from costs, are added to the papers (Article 5(1)). The papers, together with the transcript of any hearing, are transmitted directly to an agency (the Receiving Agency) designated by the State in which the respondent is present (Article 5(2)).

On receipt of the papers, the Receiving Agency is authorized and required to "cause proceedings to be instituted and prosecuted in a competent Tribunal, as well as to procure the execution of such judgment as may be rendered" (Article 7(1)). In other words, the Receiving Agency will commence an action for support on behalf of the applicant, either directly or with the assistance of counsel, in the competent court having jurisdiction over the respondent. The proceedings are governed by the law of the tribunal seized with the matter (Article 7(2)). Thus the *lex fori* must be followed in order to obtain and enforce a maintenance order under the Draft Convention.

While the appointment of the Transmitting Agency is not compulsory, every contracting State is bound to designate a Receiving Agency in its territory. The Receiving Agency may be a public or private institution (Article 2(4)).

It appeared to the Committee of Experts that local authorities might advantageously act as Transmitting Agencies because a summary examination of the application and the hearing of witnesses should take place where the claimant resides. The Receiving Agency, on the other hand, was envisaged as a single authority in order that Transmitting Agencies in one country should have no difficulty in ascertaining to which agency in another country the papers should be transmitted. In order to expedite the proceedings, Transmitting and Receiving Agencies were authorized to communicate directly with their opposite numbers in other countries (Article 2(6)).

A dependent who has obtained a maintenance order in the country where he resides may use the machinery set up by the Draft Convention. The record of the judgment may be transmitted in the same manner as an application. In this case the judgment creditor would be permitted to seek enforcement of the maintenance order in accordance with the procedure applied by the tribunal for recognizing and enforcing foreign judgments (Article 6). The Draft Convention applies also to applications for variations of maintenance orders (Article 9).

Other provisions of the Draft Convention are noteworthy. Article 8 lays down in some detail the procedure whereby the tribunal seized with the action may issue letters of request to obtain further evidence in another country. If the papers submitted by the Receiving Agency do not constitute evidence, the tribunal may, nevertheless, make an interim order for the payment of main-

tenance while the proceedings are pending (Article 7(3)). Claimants are granted exemptions and facilities with respect to costs, bonds, or security required by the law of the tribunal, fees for certification and legalization of documents, and transfer to foreign countries of funds payable under the Convention (Articles 10 and 11). A Federal Clause was included laying down that no provision of the Convention should be deemed to affect, or to impose any obligation in respect of, any matter not within the constitutional competence of a Federal State (Article 14). The final clauses contained in Articles 15–20 reproduce, with minor modifications, the provisions of other multilateral conventions concluded under the auspices of the United Nations.

(b) Model Convention on the Enforcement Abroad of Maintenance Orders

The Committee of Experts was convinced that a multilateral instrument for the purpose of aiding dependents to bring maintenance actions in the competent foreign courts would be the most effective answer to the problem. It considered, however, that the existing procedures for the enforcement abroad of maintenance orders could be usefully improved for the benefit of a dependent who had obtained a judgment in his own country. Accordingly, the Committee prepared also a Draft Model Convention on the Enforcement Abroad of Maintenance Orders to be offered to States as a model for bilateral treaties or uniform legislation. This project was intended primarily for countries permitting the enforcement of foreign judgments by *exequatur* or registration.

The draft followed the lines of the Secretariat's Model Convention on the Enforcement of Maintenance Obligations[18] and the Rome Institute's draft. One significant difference, however, is that the Committee's draft applies only to maintenance orders rendered by a court of the country in which the respondent was resident when the proceedings were instituted, or by a court to whose jurisdiction he submitted expressly or by implication (Article 3). Thus the scope of this draft was restricted by the exclusion of judgments rendered by a court of the country where the claimant resided when the proceedings were instituted. In the words of the commentary to the draft, "Although the Committee is aware that the exclusion of the competence of the courts of residence of the dependents will bar many persons from availing themselves of the benefits of this Convention, it considers that no exception should be made to the jurisdictional principle that a court cannot acquire jurisdiction over a defendant who is in another country and has not submitted expressly or implicitly to the jurisdiction of that court."[19] In another respect, however, the Committee's model has a wider application than the Secretariat's draft because while the latter was limited to judicial decisions, the Committee's project applies also to other enforceable instruments, such as orders of administrative authorities and arbitral awards (Article 14).

In order to obtain the enforcement of a maintenance order in the foreign

[18] E/AC.39/L.3.

[19] E/AC.39/1, paragraph 58.

country to which the judgment debtor has moved, a dependent must make an application to the competent court of that country (Article 4(1)). The application may be made either directly or through an authority designated by the government of the territory where the enforcement takes place. If the latter procedure is followed, the authority is required to "act without delay" (Article 4(3)). It must therefore institute execution proceedings ex officio in the competent court, acting in a capacity similar to the Receiving Agency under the Committee's draft multilateral convention. This provision would be of great assistance to judgment creditors who at present have to retain counsel abroad for the purpose. A foreign maintenance order is enforceable if it fulfils conditions similar to those mentioned above in describing the Rome draft. The procedure of enforcement is by way of *exequatur* or registration (Article 5), depending upon the rules of the enforcing court. For countries not familiar with the *exequatur* or registration procedure, the Model offers an alternative method of execution whereby the competent court, if the same conditions are fulfilled, is required to render a new order based upon the recognition of the foreign maintenance order. A maintenance order granted *exequatur* or registered has the same force and effect as an order originally rendered by the enforcing court (Articles 6 and 7(2)). A novel feature is contained in Article 7(1) providing that a maintenance order is enforceable even though it may be subject to variation by the original court. Article 8 enables the enforcing court to modify the amount and rate of payments prescribed in the original order. The exemptions and facilities laid down in the Model are the same as those of the Committee's draft multilateral convention.

(c) The Committee's Conclusions

In concluding, the Committee of Experts recommended that the problem could be solved by way of a multilateral convention compatible with the different legal systems. Furthermore, countries familiar with the procedure of enforcement of foreign judgments could usefully improve it on a reciprocal basis. For these reasons, the Committee transmitted to the Economic and Social Council the Draft Convention on the Recovery Abroad of Claims for Maintenance for adoption by States as a multilateral convention. It also transmitted the Draft Model Convention on the Enforcement Abroad of Maintenance Orders for use by States as a model for bilateral treaties or uniform legislation.

The draft multilateral convention was considered by the Committee the major contribution. One of the principal aims of the Committee was to find a solution acceptable to common law as well as to civil law countries, and to federal as well as to unitary States. To achieve this, the Committee endeavored to avoid as much as possible the need for changes in the legislation of the Contracting Parties. By adopting the basic principle that the proceedings are governed by the *lex fori*, the convention refrains from imposing its own rules upon domestic law. In the United States, the convention would not interfere

with the jurisdiction of State courts in matters of family support, and would seem to fit without undue difficulty into the system of reciprocal support legislation already in force among almost all the States of the Union.

Action by the Economic and Social Council and the General Assembly

On February 13, 1953, the Secretary-General submitted the report of the Committee of Experts to the Economic and Social Council. In a note of transmittal,[20] the Secretary-General said that in his opinion the two instruments constituted an important contribution to the solution of the problem. He expressed general agreement with the Committee's conclusions.

The item "Recognition and Enforcement Abroad of Maintenance Obligations" was placed on the agenda of the fifteenth session of the Council. On March 31, 1953, the Council decided to postpone consideration of the question until its seventeenth session.

The subject was raised at the eighth session of the General Assembly during the debate on the report of the Economic and Social Council.[21] The representative of Denmark stressed the importance and urgency of finding a way to help many women and children who were in a desperate position because of their inability to take legal action against men responsible for their support residing in other countries. Noting that the question had been considered since 1925, the Danish representative expressed the hope that the Council would complete its work on this subject as soon as possible. Denmark, Brazil, Greece, the Netherlands, Norway, and Sweden introduced a draft resolution[22] in which the General Assembly "Being aware of the urgent need to improve the situation of members of families whose legal supporters living in another country fail to comply with their maintenance obligations," requested the Council "to do its utmost to complete, if possible, its work on this question in such time as to enable it to report on the results to the General Assembly at its next regular session." The resolution was adopted on November 28, 1953,[23] by a vote of 48 in favor, none against, and 7 abstentions.

At the seventeenth session of the Economic and Social Council, the Norwegian representative fully supported the work of the Committee of Experts[24] and introduced a draft resolution[25] whereby the Council would call a conference of plenipotentiaries for the purpose of completing and signing the multilateral convention, and would recommend to governments to use the text of the other project as a model for bilateral treaties or uniform legislation.

The representative of the United States agreed to the transmission of the

---

[20] E/2364.
[21] A/C.3/SR.508; A/C.3/SR.511; A/C.3/SR.512.
[22] A/C.3/L.373.
[23] General Assembly resolution 734(VIII).
[24] E/AC.7/SR.257.
[25] E/AC.7/L.190.

model convention to governments as a guide for the conclusion of bilateral agreements. The representative explained, however, that the United States would not consider participating in a convention along the lines of the model because matters of private law were within the competence of the States, and not of the Federal Government. As regards the draft multilateral convention, the United States did not consider that the adoption of a multilateral convention would be an appropriate solution.[26] Accordingly, the United States and Ecuador introduced a draft resolution[27] which, in its operative part, requested the Secretary-General "to transmit the Report of the Committee of Experts to governments for information and such action as they may deem appropriate." After some discussion, the representative of Venezuela proposed a compromise solution[28] which was later incorporated in a draft resolution introduced by Belgium, Cuba, France, and Venezuela.[29] The draft resolution recommended to governments the use of the Model Convention as a guide for the preparation of bilateral treaties or uniform legislation to be enacted by individual States. With respect to the draft multilateral convention, it requested the Secretary-General "to ascertain from States Members of the United Nations and those non-members of the United Nations which are members of any of the specialized agencies whether they consider it desirable to convene a conference of plenipotentiaries to complete the drafting of the Convention on the Recovery Abroad of Claims for Maintenance, and whether they are prepared to attend such a conference," and to report to the Council on the result of this consultation not later than the nineteenth session. On April 26, 1954, the resolution was adopted by the Economic and Social Council (resolution 527 (XVII)) by sixteen votes in favor, none against, and two abstentions.

The Secretary-General asked governments to indicate their views not later than October 15, 1954. The decision whether there will be a convention now rests with the governments. If sufficient interest is shown, the Economic and Social Council will in all probability call an international conference under Article 62 of the United Nations Charter.

PAOLO CONTINI*

---

[26] E/AC.7/SR.257.
[27] E/AC.7/L.189.
[28] E/AC.7/SR.257.
[29] E/AC.7/L.192/Rev.1.

* Senior Legal Counsellor, Legal Department of the United Nations.

JUDICIAL REVIEW OF CONFISCATORY LEGISLATION UNDER THE NORTHERN IRELAND CONSTITUTION

The Government of Ireland Act, 1920, which established a parliament for Northern Ireland[1] conferred on that parliament limited legislative powers. There thus came into being in the United Kingdom for the first time a legislature whose enactments were subject to judicial review, and British constitutional lawyers bred in the tradition of Coke, Blackstone, and Dicey to think of the power and jurisdiction of parliament as transcendant and absolute have been compelled, as far as Northern Ireland is concerned, to discard a fundamental conception.

The scheme of the disposition of powers by the Act of 1920 was first to confer on the Northern Ireland parliament a general power to legislate for "peace, order, and good government,"[2] and then to restrict the general power by a number of exceptions and reservations. The principal exception is that the Northern Ireland parliament cannot make laws "except in respect of matters exclusively relating to" Northern Ireland, and section 4 of the Act of 1920 particularly sets out a number of excepted matters which are clearly matters not exclusively relating to Northern Ireland since they pertain to the United Kingdom as a whole. Examples of such excepted matters are the Crown and Crown property, peace and war, the armed forces, foreign affairs, external trade, coinage, weights and measures, trade marks and copyright.

The reserved matters are matters which would ordinarily relate exclusively to Northern Ireland but which the United Kingdom parliament decided in 1920 to retain under its immediate control. Examples of such reserved matters are the postal service, trustee savings banks, matters relating to the Supreme Court of Northern Ireland, and certain types of taxation. The purposes of reservation were diverse: some matters were reserved for purely temporary reasons and have since been de-reserved; other matters were reserved pending the possible establishment of a parliament for all Ireland; and the reservation of certain taxing powers was designed to secure uniformity through the United Kingdom in respect of customs and excise duties and income tax.

Except on one point which forms the subject of this article, there has been little attack on the validity of Northern Ireland legislation. The Northern Ireland parliament has no ambitions to trespass on forbidden territory; the Northern Ireland parliamentary draftsman has the question of *ultra vires* constantly in mind; and the Governor of Northern Ireland requires every bill submitted for the royal assent to be accompanied by a certificate from the Attorney-General for Northern Ireland stating that the bill does not offend against the

[1] The Act established a similar legislature for Southern Ireland, but this part of the Act became ineffective in 1922 with the establishment of the Irish Free State.

[2] These are the words traditionally used when the United Kingdom parliament establishes a new legislature and by themselves they import the widest powers of legislation: see *A.-G. for Saskatchewan v. C.P.Ry.* [1953] A.C. 594.

provisions of the Act of 1920. The one matter which has given rise to doubts and differences is the interpretation of the last five words of section 5(1) of the Act of 1920, and they are words with a history.

All Home Rule measures for Ireland—a land ever rent by religious disputes—have contained a provision preventing the subordinate legislature from legislating so as to give any preference or subject to any prejudice on account of religion or religious belief, and the first Home Rule measure to get on the statute book—the Government of Ireland Act, 1914[3]—contained section 3 which was a long section prohibiting both in particular and in general terms every kind of discrimination on religious grounds. When the bill which ultimately became the Act of 1920 was first presented to parliament this section 3 of the Act of 1914 was reproduced unaltered as clause 5(1). In the course of the passage of the bill through parliament the government accepted an "anti-socialism" amendment proposed by a private member which would prohibit the Northern Ireland parliament legislating so as to "take any property without compensation." The 1893 Home Rule bill had contained a similar provision aimed at preventing the Irish Parliament making laws "whereby private property may be taken without just compensation," and it is interesting to note that this provision, for which Viscount Bryce was responsible, was inspired by the American constitution, for there were also references to being "deprived of life, liberty or property without due process of law" and to "equal protection of the law."[4] However, the provision of the 1893 bill was not repeated in the Act of 1914, nor in the bill submitted in 1920, and the acceptance in 1920 of the amendment to add the words "take any property without compensation" raised the question where these words should be inserted. For the want of anywhere better to put these five words, they were tacked on to the end of clause 5(1), and the result is that a provision aimed at protecting property rights generally comes at the tail end of a series of provisions which are concerned solely with religion.[5]

---

[3] The Act of 1914 had its operation suspended by reason of the outbreak of the first world war and was repealed by the Act of 1920 without it having come into effect.

[4] See Parliamentary Debates, 4th series, vol. 13, cols. 1082–1155.

[5] Section 5(1) reads:

"In the exercise of their power to make laws under this Act neither the Parliament of Southern Ireland nor the Parliament of Northern Ireland shall make a law so as either directly or indirectly to establish or endow any religion, or prohibit or restrict the free exercise thereof, or give a preference, privilege, or advantage, or impose any disability or disadvantage, on account of religious belief or religious or ecclesiastical status, or make any religious belief or religious ceremony a condition of the validity of any marriage, or affect prejudicially the right of any child to attend a school receiving public money without attending the religious instruction at that school, or alter the constitution of any religious body except where the alteration is approved on behalf of the religious body by the governing body thereof, or divert from any religious denomination the fabric of cathedral churches, or, except for the purpose of roads, railways, lighting, water, or drainage works, or other works of public utility upon payment of compensation, any other property, or take any property without compensation.

"Any law made in contravention of the restrictions imposed by this subsection shall, so far as it contravenes those restrictions, be void."

For sixteen years these words went unnoticed as far as the courts were concerned, and when they were first referred to in *Robb v. Electricity Board for Northern Ireland*[6] they were accepted at their face value as imposing a general prohibition on confiscatory legislation. But in the following year in *O'Neill v. Northern Ireland Road Transport Board*,[7] it was contended by the defendants, supported by the Attorney-General for Northern Ireland, that these words must be construed *ejusdem generis* with the other prohibitions contained in section 5(1), and that accordingly they meant "take any ecclesiastical property without compensation." However, the Court of Appeal in Northern Ireland held, though with some hesitation, that the words were of general application. "On the whole," said Andrews L.C.J., "we feel that the balance of the weight of argument is in favour of assigning to the words their literal and wider meaning, holding that the Parliament of the United Kingdom in its wisdom deemed it expedient, when delegating certain of its legislative powers, to provide against the confiscation of any kind of property in Ireland, of which under local legislatures there was always at least a possibility in a country where religious differences were not the only cause of personal and class animosities."[8]

In 1940 the words were again before the Court of Appeal in Northern Ireland in *Northern Ireland Road Transport Board v. Benson*,[9] a case to which we must refer in detail later. It was not open to the parties to reopen the correctness of the interpretation of the words which had been laid down in *O'Neill's* case, but an appeal was taken to the House of Lords for the purpose, *inter alia*, of testing that decision. Unfortunately, the proceedings in the House of Lords came to an untimely end when one of the law lords noticed that the whole of the proceedings were misconceived.[10] No one has since sought to review the decision in *O'Neill's* case, and though it is still open to the House of Lords to consider the matter when a suitable occasion presents itself it is now regarded as settled law in Northern Ireland that the five words impose a general ban on confiscatory legislation of any kind. Indeed, section 2 of the Northern Ireland Act, 1947—an Act passed by the United Kingdom parliament—assumes the correctness of the decision in *O'Neill's* case.

We can now turn attention to the extent of this general prohibition against confiscatory legislation. Though the Act of 1920 is the first time any express limitation has appeared in our constitutional law, there is a venerable tradition opposed to legislation of this type. Throughout the middle ages, a recurrent

[6] [1937] N.I. 106.

[7] [1938] N.I. 104.

[8] [1938] N.I. at p. 116.

[9] [1940] N.I. 133.

[10] *Benson v. Northern Ireland Road Transport Board* [1942] A.C. 520. The case had begun with a prosecution of a road haulier for an offence against the Road and Railway Transport Act (Northern Ireland), 1935. The charge was dismissed by the magistrate at petty sessions, and the subsequent appeals to quarter session, the Court of Appeal in Northern Ireland and the House of Lords were without jurisdiction, since there cannot ordinarily be an appeal from the dismissal of a criminal prosecution.

theme in the catalogues of grievances presented to the king was the complaint against arbitrary confiscation by royal officials. It finds early expression in the celebrated chapter 39 of Magna Carta directed against arbitrary infringements of the right of property, and appears again in the statute 28 Edward III c. 3 which declared against the taking of property without due process of law. It was only natural, therefore, that the respect for property rights thus engendered should lead lawyers to question the power of parliament to do this very thing which was so reprehensible in royal officials, and when Coke and his friends spoke of the powers of the court to control acts of parliament and adjudge them to be void they may well have contemplated absolute rights of property against which statute law could not prevail.

The supremacy of parliament was established at the revolution of 1688, and that event really marked the end of the doctrine that the statutes of the Westminster parliament could be subject to judicial review. It took a couple of generations for this fact to be frankly recognised. Blackstone's writings in the second half of the eighteenth century show the conflict in his mind between the principles of the sanctity of property and the supremacy of parliament. He regards the law of nature as "superior in obligation to any other,"[11] and the right of private property is assured by "the law of nature and reason,"[12] and "the principles of universal law."[13] This leads to the obvious conclusion that there is "an absolute right, inherent in every Englishman, of property."[14] On the other hand, he admits, almost regretfully, "but if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it."[15] The result is that this absolute right of property is open to attack from one quarter, for the legislature can compel the owner to surrender his land and his goods. "But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him full indemnification and equivalent for the injury thereby sustained."[16]

The result was to substitute for a rule of law a principle of political expediency, which, with a few minor exceptions, has been faithfully followed by the Westminster parliament even down to the socialistic legislation of the past decade. But because the principle was political and not legal, its interpretation was wholly withdrawn from the courts of law. The Westminster parliament never felt the need to indulge in any analysis of the conception of property, nor was there any consideration of the circumstances that could justify a taking of certain types of property rights without compensation. A survey of the legislation of the past one hundred and fifty years suggests that parliament

[11] Commentaries, i, 41.
[12] *Ibid.* ii, 3.
[13] *Ibid.* ii, 9.
[14] *Ibid.* i, 138.
[15] *Ibid.* i, 91.
[16] *Idid.* i, 139.

proceeded on the footing that "property" meant tangible property and a few of the more obvious forms of intangible property, such as patents and goodwill, but we can point to a number of statutes which have swept away what any lawyer would recognise as valuable property rights without it being clear whether the legislature thought that it was not confiscating property or thought that there was a justification for denying compensation. Consequently when the Northern Ireland courts found themselves for the first time confronted with the task of interpreting the phrase "take any property without compensation" they lacked any body of case law, English or Irish, which could afford guidance.[17]

The first and second cases on these words did not raise difficulties. *Robb's* case[18] was a clear taking of property rights in land, and the only question before the court was whether the impugned legislation provided compensation. *O'Neill's* case[19] merely raised the question whether a payment otherwise than in cash amounted to compensation. The difficulties arrived with *Benson's* case,[20] and though in view of the decision of the House of Lords that the proceedings before the Court of Appeal in that case were without jurisdiction and consequently the judgment is of no binding authority,[21] the opinions of the judges deserve careful scrutiny.

The Road and Railway Transport Act (Northern Ireland), 1935, had nationalised road transport in Northern Ireland by establishing a Road Transport Board to acquire every road motor undertaking on payment of compensation, and by providing that after the coming into force of the Act no person other than the Transport Board[22] should use a motor vehicle for the carriage of goods for hire or reward. In order to prevent speculators hurriedly setting up a road motor undertaking merely to qualify for compensation the Act had selected 1 June, 1934, as the material date: undertakings established before that date were to be compulsorily acquired on payment of compensation; in respect of undertakings established after that date there was no power in the Board to acquire.

Benson had set up business as a road haulier with one vehicle after 1 June, 1934, and by the time the Act came into force he had built up a substantial business. The Transport Board, though unable to acquire his undertaking, did at least buy from him the one truck with which he operated, but Benson spent the proceeds on buying a new truck and he proceeded to carry on business as before. He was accordingly prosecuted at petty sessions for disobeying the pro-

[17] Cases decided in the English courts, other than the House of Lords, are not binding on the courts of Northern Ireland but they are of considerable persuasive authority.

[18] *Supra*, at 554.

[19] *Supra*, at 554.

[20] *Supra*, at 554.

[21] This view of *Benson's* case was taken in *Ulster Transport Authority v. Brown* [1953] N.I. 79.

[22] With a few minor exceptions not material to this case.

hibition in the Act against using a motor vehicle for the carriage of goods for hire and reward, and his defence was that the prohibition was unconstitutional as amounting to a taking of property without compensation.

Benson based his case on one ground only, namely that his goodwill had been taken without compensation: there was no attempt to suggest that any other form of property had been taken. At petty sessions and on appeal to quarter sessions the Transport Board had denied that goodwill was property within the meaning of the prohibition in the Act, but this contention was abandoned in the Court of Appeal, and the argument of the Board was that there was not either directly or indirectly any "taking." The Board contended that the prohibition in the Act was directed against confiscation which implies a transfer of property from one person to another. The Attorney-General for Northern Ireland who was called in to argue the constitutionality of the Act in effect advanced the same argument: "There is a distinction between taking property and a mere negative prohibition of its enjoyment. . . . The taking of property necessarily implies its transfer as opposed to it being rendered useless in the hands of the owner."[23]

The Court of Appeal by a majority of two to one sustained the Act. The members of the majority—Andrews L.C.J. and Murphy L.J.—accepted the argument that a negative prohibition was not a taking of property. The dissenting judge—Babington L.J.—considered that there was a taking, in that the haulage contracts of Benson's customers which were the substance of Benson's goodwill would necessarily pass to the Board as the only hauliers left in the field.[24]

It will be appreciated that the case was fought on a very narrow front, and possibly the one least advantageous to Benson. Benson had complained of the taking of one property right—his goodwill in his business, and there are good reasons for questioning whether any such property right was taken. None of the judges attempted any analysis of the nature of goodwill, but if such an analysis had been undertaken it must have disclosed that goodwill is a type of property which can be used and enjoyed, and therefore taken, only in a very special way.

A trader has by his business operations created a factual situation in which a number of customers habitually resort to him rather than to his competitors; his ability to exploit this situation enhances the value of his undertaking, and the protection afforded by the law to this exploitation brings into existence a valuable property right which we call goodwill. But it must be noticed that the protection afforded is limited to restraining competitors from misrepresenting themselves to be the trader in question or misrepresenting themselves as carrying on his business; goodwill is not protected against competition as

[23] Black A.-G. [1940] N.I. at pp. 141–2.

[24] Babington L. J.'s dissent is remarkable in that he had, when Attorney-General, certified the Act in question to be within the powers of the Northern Ireland Parliament.

such but only against such competition as tends to make use of the known habits of customers to resort to the old firm. We can also observe that the only way in which goodwill can be transferred is by the transferor permitting the transferee to exploit the situation which the transferor has brought into existence while he himself agrees no longer to exploit it. It is for these reasons that the business name forms such an important element in goodwill; the old customers whose habits form the goodwill recognise the business by its name and on a transfer of goodwill they continue to resort to what is in substance a new business because they choose to follow the will-o'-the-wisp of a name.

In the light of such an analysis it is evident that there was no taking of goodwill in *Benson's* case. The Board never purported to hold themselves out as successors to Benson by using his name or in any other manner. The truth is that after the coming into force of the Act the factual situation which Benson had created continued to exist: his old customers were still of the same mind to resort to him through force of habit. That Benson could not exploit this situation was not because the Board had taken his goodwill but because he was not permitted to use his lorry for the carriage of goods for hire or reward. Benson might, therefore, have contended that there was a taking of property in his lorry, or a taking of property in his right to carry on a business, but no such line of argument seems to have occurred to his advisers.

We may now pass to the latest case of *Ulster Transport Authority v. Brown & Sons, Ltd.*[25] The Transport Act (Northern Ireland), 1948, had replaced the Northern Ireland Road Transport Board by the Ulster Transport Authority with similar but more extensive powers. Section 18(1) of the Act of 1948 contained a provision similar to that under consideration in *Benson's* case, by which no person other than the Authority was permitted to carry goods for reward, but section 19(1) exempted from the operation of section 18(1) the use by furniture removers of motor vehicles "to move furniture or effects, not being part of the stock in trade of the owner thereof, from or to premises occupied by such owner to or from other premises occupied by such owner or to or from a store." This wide exemption did not cover a substantial business activity of furniture removers which was the carriage of furniture to and from auction rooms, which had previously been permitted under the Act of 1935, and James Brown & Sons, Ltd. (whom we will hereafter refer to as "Browns") were prosecuted for carrying a quantity of furniture from auction rooms to a purchaser's premises. Browns were convicted at petty sessions, but this decision was reversed by a Divisional Court of the Queen's Bench Division and the reversal was sustained in the Court of Appeal.

Browns alleged, as Benson had alleged, that there was a taking of property without compensation, but on this occasion counsel appears to have attempted to go further than allege merely a taking of goodwill, for it was contended that Browns' interest in carrying on a particular kind of haulage work was a

[25] [1953] N.I. 79.

property right, and in the Divisional Court this view found favor with Curran J.[26] However, the Court of Appeal were able to find for Browns on the footing of a taking of goodwill and the members of the court carefully refrained from expressing an opinion whether the right to exercise a trade comes within the meaning of property. Lord MacDermott, the Lord Chief Justice, noticed the view adopted by Curran J. but continued: "No doubt, most kinds of property may, in the final analysis, be said to consist of a bundle of rights, but the term is not necessarily synonymous with a right no matter how fundamental and valuable that right may be, and I do not wish to be taken as acquiescing in the view that the right to exercise a lawful trade comes within the common meaning of property and therefore within that view as it is used in section 5(1)."[27]

On the footing that the property involved in the case was goodwill, the arguments then proceeded with the question whether there was a taking. The Transport Authority relied, as their predecessors had relied in *Benson's* case, on the proposition that a mere negative prohibition is not a taking, but this argument was rejected on the ground that the prohibition was not merely negative. The purpose of the Act was clear: it was a prohibition with an ulterior purpose. Road hauliers were to be prohibited from doing the class of haulage in question in order that the business should fall to the Transport Authority as the monopolist left in command of the roads.

Such being the present state of the authorities in Northern Ireland, we may now speculate on the possible developments. So far only the fringe of the problem has been touched, and it is reasonable to suppose that the tendency for socialistic and monopolistic legislation to increase together with the increasing awareness of lawyers of the possibilities of attacking such legislation will result in the courts being asked to advance beyond the more elementary conceptions of "property" and "taking."

It might be thought that the reluctance of English lawyers to extend the conception of property rights past tangible property is based on an adherence to a long standing tradition. In fact, until the nineteenth century, the tradition was the other way. Maitland has told us that the realm of mediaeval law was rich with incorporeal things, and many of these incorporeal things had no relation to land or to any specific moveable; the twelfth century Englishman was quite conversant with the notion of "owning" a debt, for the action of debt was truly proprietary. As late as Blackstone we find the word "property" being used as descriptive of the rights which a man has in the services of his

---

[26] "The appellants had devoted skill and energy in the exercise and development of their trade. In the continued exercise of their right to trade they had acquired experience and no doubt greater knowledge and skill in their particular type of business. They had built up in this way something of value based upon and dependent upon the continuance of their right to carry on their trade. . . . Is this not a personal right in the nature of property?" [1951] N.I. at p. 100.

[27] [1951] N.I. at p. 111.

servant. It was probably Bentham's denial that the term "property" could be used to include rights which did not relate to material things which changed the fashion, and the principal English writers on jurisprudence in the nineteenth century—Austin, Pollock, Holland, and Salmond—are all insistent on the point that to extend the conception of property past those cases where a person exercises power over a portion of the physical world is to venture into the realm of analogy and metaphor. Nor has the English practising lawyer had any inducement in modern times to argue for an extended conception of property: rights in land, rights in chattels, rights in action, rights of personality—all these were protected in the courts in their several ways, and there was never any compelling need to subsume them under the one conception of "property." In the United States the tale has been different. The prohibitions in state and federal constitutions against the taking of property have naturally stimulated astute lawyers to discern property rights where an English lawyer would never suspect their existence.

It is for this reason that the lawyers of Northern Ireland have now become interested in United States decisions in order to derive guidance in the interpretation of these concluding words of section 5(1) of the Government of Ireland Act, 1920. The search is directed to three ends: firstly, to assign a meaning to "property;" secondly, to decide what constitutes a taking; and thirdly, to discover what implied exceptions there are to this apparently absolute prohibition. But these problems cannot be treated in complete isolation: for example, the meaning that can be assigned to "taking" may vary according to the nature of the property alleged to be taken; and it is not unknown for courts to hold that there is no taking where a more acute analysis would show that what is really meant is that the taking is justified.[28]

There is no doubt that "property" in section 5(1) covers all interests in land and all chattel interests. It is also certain that it covers certain types of choses in action which are by common consent regarded as property for the reason—not very satisfying on juridical grounds—that they are habitually traded in: such are patents, copyright, goodwill, the right to trade-marks and trade names, stocks and shares, and insurance interests. Presumably all other types of vested contract rights would be regarded as property, though this is not certain: the Hire Purchase Act (Northern Ireland), 1940, clearly deprived persons who had entered into contracts before the commencement of that Act of rights acquired under such contracts without any suggestion of compensation being paid.[29] It is less certain that vested rights arising *ex delicto* would be regarded as property; the fact that the tradition of English law is that such

[28] See for example *Commonwealth v. Tewksbury* (1846) 11 Metc. 55, 59, where Shaw C. J. concluded that a statute prohibiting riparian owners from removing stones from beaches was "not such a taking, such an interference with the right and title of the owner" because it was "a just restraint of an injurious use of the property."

[29] The Moneylenders Act (Northern Ireland), 1933, likewise deprived persons of vested rights under moneylending contracts entered into before the commencement of the Act.

rights are not generally transmissible would probably lead to a reluctance to treat them as property, and there are several examples of Northern Ireland statutes which have abolished vested rights of action arising *ex delicto*.[30]

Certainly there is no disposition on the part of the courts to venture further at present and extend the conception of property to such rights as the right to exercise a trade or profession. This reluctance, it is submitted, springs from a failure to consider the word "property" in its special setting of section 5(1). The basic purpose of a prohibition against taking property without compensation is to prevent individuals being deprived of interests previously secured by the legal order which have an economic value, and it is immaterial whether such interests are usually classified as "interests of personality" or "domestic interests" or "interests of substance." In truth every interest in respect of which the deprivation can be measured in terms of money is an "interest of substance" and within the meaning of "property" in section 5(1).

When we come to consider the meaning to be assigned to "taking" we can see that it is a misfortune that such an ambiguous word has been employed, for English literary usage equally recognises "taking" as meaning a mere deprivation or as meaning an appropriation. From the point of view of the person from whom there is a taking the difference is immaterial: he has lost, and he cares not whether another has gained. It may therefore be that the proper way to approach this problem of interpretation is to turn once more to the basic purpose of the prohibition. Is it aimed at preventing the impoverishment of the individual by ensuring that he shall not be deprived of interests which have an economic value, or is it aimed at preventing the State enriching itself at the individual's expense? In the light of the respect for property rights which is traditional in the English legal system, it is submitted that the former view is the correct one, and consequently it follows that a negative prohibition which obliterates a property right is a taking. This view certainly accords with the view many times expressed in the courts in the United States.[31]

We now come to the third and most difficult problem. What limits are to be put to the apparently absolute prohibition in section 5(1)? If we accept the

---

[30] For example, the Matrimonial Causes Act (Northern Ireland), 1939, abolished actions for criminal conversation without a saving for rights of action accrued before the commencement of the Act, and the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, deprived persons of vested rights of action against the husband of a woman tortfeasor.

[31] "When an owner is deprived of the right to expose for sale and sell his property, he is deprived of property, within the meaning of the Constitution, by taking away one of the incidents of ownership." (Cartwright C. J. in *City of Chicago v. Notcher* (1899) 183 Ill. 104); "To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating it or destroying it." (Holmes J. in *Pennsylvania Coke Co v. Maka* (1922) 260 U.S. 393); "If the right of indefinite user is an essential element of absolute property or complete ownership, whatever physical interference annuls this right takes property, although the owner may still have left to him valuable rights (in the article) of a more limited and circumscribed nature." (Smith J. in *Eaton v. Boston etc. R.R.* (1872) 51 N.H. 504).

wider meanings of "property" and "take" contended for above, it is evident that the courts will be driven to hold certain types of taking property without compensation as justified, otherwise the powers entrusted to the Northern Ireland Parliament would be largely nullified. Hitherto the omnipotence of the Westminster Parliament has not called for the recognition and enunciation of a police power in the state, but it now seems that the courts of Northern Ireland may be driven to recognise such a power. The classic definition of the police power by Shaw C.J. in *Commonwealth v. Alger*[32]—"the power vested in the legislature by the Constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth and the subjects of the same"—represents the same principle expressed in section 4 of the Government of Ireland Act, 1920, where the Parliament of Northern Ireland is given power to legislate for the peace, order, and good government of Northern Ireland. The task of the courts will be to reconcile this police power entrusted to the legislature in Northern Ireland with the constitutional restrictions in section 5(1). Anyone who has even a nodding acquaintance with the constitutional law of the United States will realise that it is not an easy task.

The task may be assisted by the "pith and substance" doctrine which was developed by the Judicial Committee of the Privy Council in relation to cases arising under federal constitutions in the dominions and was applied to Northern Ireland legislation in *Gallagher v. Lynn*.[33] Under this doctrine the court has to look at the "pith and substance" of the impugned legislation, and if on the view of the statute as a whole it is found that the substance is *intra vires* it is not invalidated because it incidentally affects matters outside the authorised field. The doctrine is not an easy one to apply since it is impossible to explain "pith and substance" otherwise than by employing equally indefinite phrases such as "impair in a substantial degree." The doctrine is not an easy one to apply since there are no recognised canons of construction for determining what is the "pith and substance" of legislation: to enquire whether the Act is "fairly within the scope of" the permitted field,[34] or whether the subject matter which has an immunity is "impaired in any substantial degree"[35] is merely to substitute one obscurity for another. However, as Lord MacDermott indicated in *Browns'* case, there is an obstacle to applying the "pith and substance" doctrine to cases of the kind under consideration. The prohibition in section 5(1), unlike those in section 4 to which the "pith and substance" doctrine was applied in *Gallagher v. Lynn*, is qualified by the words "directly or indirectly" —"the Parliament of Northern Ireland shall not make a law so as either di-

[32] (1851) 7 Cush. 53.
[33] [1937] A.C. 863.
[34] *A.-G. for British Columbia v. A.-G. for Canada* [1937] A.C. 371.
[35] *Lymburn v. Mayland* [1932] A.C. 323.

rectly or indirectly to . . . take any property without compensation." This appears to make it impossible to justify a taking of property without compensation as being merely an indirect and incidental result of otherwise valid legislation.[36]

Somehow or other the courts will have to strike a balance between the absolute prohibition and the need to make the constitution work. Some words of Mr. Justice Holmes succinctly state the point: "The great constitutional provisions for the protection of property are not to be pushed to a logical extreme, but must be taken to permit the infliction of some fractional and relatively small losses without compensation, for some, at least, of the purposes of wholesome legislation."[37] But what is wholesome legislation? Legislation is often of metal forged in the fires of political controversy, and there being no general consensus as to its wholesomeness, an appeal to the courts on such an issue must be an appeal from the prejudices of politicians to the prejudices of judges. It is certainly no test of wholesomeness that the community is the gainer at the expense of the individual; it was precisely to prevent the application of such a principle that the concluding words of section 5(1) were added in 1920.

F. H. NEWARK*

[36] On the other hand it could be argued that the words "directly or indirectly" apply to the substance of the legislation: that is to say, the Northern Ireland Parliament cannot use indirect means in order substantially to evade the restrictions of section 5(1), but that if the substance of the legislation is *intra vires* a merely incidental breach of section 5(1) is immaterial.

[37] *Interstate Railway Co. v. Massachusetts* (1907) 207 U.S. 79, 87.

* Professor of Jurisprudence, The Queen's University of Belfast.

SWEDISH CARTEL AND MONOPOLY CONTROL LEGISLATION

On August 1st, 1946, Sweden got its first modern cartel and monopoly control law.[1] At the same time a special agency, known as the Cartel Control Bureau, was organized as part of the Department of Commerce in charge of the official registration of all restrictive cartel agreements. The staff of the agency consists of about sixteen officials including statisticians, economists, and persons with legal training. It is planned to build up a special division within the bureau to carry out continuous price analyses, thereby taking over certain functions belonging to the State Price Control Administration.

The main part of the law of 1946 provides for an official register of restrictive cartel agreements similar to those in use in Norway and Denmark. In

[1] "Lag om övervakning av konkurrensbegränsning inom näringslivet," given Stockholms slott den 29 juni 1946.

connection with preparing registration of agreements, the Control Bureau has the right to request information from all individuals and firms which have concluded agreements restraining trade and affecting prices, production, sales turnover, or transportation within the country. This applies also to all those who professionally engage in lending money, dealing in foreign exchange, licensing patent rights and trade marks, or the use of certain other necessities, as well as everyone doing business in the hotel field. Registration of an agreement at the Bureau does however not in itself constitute any discrimination according to Swedish law and serves only to give knowledge of the existence of different types of restrictive agreements.

The theory behind the law is that restraint of trade by cartel agreements may have detrimental consequences in different ways. High prices might be maintained which are not justified by production costs, production can be limited, and expensive production methods, which are obsolete, can be preserved. The general employment policy of the country can thereby become endangered and the interests of the consumer neglected. On the other hand, the Government does not consider "incomplete competition" as being *per se* injurious or having detrimental effects. A certain concentration of production or trade often provides the grounds for efficient management of production or distribution of goods.[2]

Restrictive arrangements and agreements in which the Bureau finds reason to suspect injurious effects against the public interest are subject to closer investigation. The Bureau has the right to investigate the activities of parties to the agreements. These "special investigations" are, as a rule, of an economic and statistical nature. To date, seven detailed investigations of this type have been completed, respectively concerning: the manufacture and trade of agricultural machines (1950); a cartel organization trading in iron beams; heating and sanitary goods (in two parts); heating elements (1951); stainless steel sinks (1953); the flat-glass wholesale trade in Sweden (1952); and the furniture trade (1953).[3]

The registration activity of the Bureau to the middle of 1954 has resulted in the registration of about 1200 cartel agreements for several hundred different classes of goods. As the building industry is of predominant interest to the country, the Cartel Control Bureau co-operates in this field with a special parliamentary committee on building materials. Several other important branches of Swedish industry and trade, however, have not yet been investigated. In the beginning, no detailed plan existed as to the priority of registration. Gradually, however, branches which influence employment, the general price level, and the public health are given first consideration. The overwhelming majority of cartels registered are price-fixing cartels.

Summaries of all registered agreements are published in abbreviated form

[2] Utredningar angående Ekonomisk Efterkrigsplanering XII, Statens Offentliga Utredningar, 1945: 42, Stockholm.

[3] Special investigations of the wholesale trade in pipes, the business of electrical installations, and the trade in plant bulbs are in preparation.

in a periodical, called "*Kartell Registret*" which can be bought by anyone for a nominal fee. Thus far, forty-three issues of the periodical have been published. The original agreements with all enclosures, which are not published in the periodical, can be studied by anybody in the files of the Bureau. A few registered contracts are kept secret on petition of the parties, but not longer than about two years on the average. The security classification for a given agreement is decided on by the Government in each individual case.

The Control Bureau has three main functions: general analysis of the concentration of economic organizations, registration of agreements in restraint of trade, and conducting special investigations of agreements which may have injurious effects. From this it becomes clear that the Bureau has no executive power whatever. Its functions are somewhat similar to the former American Bureau of Corporations or the Federal Trade Commission in its early stages. From the beginning, the Swedish law contemplated that any interference with dangerous cartel combinations should only be initiated by the Government and the Swedish parliament.

Registering of cartel agreements according to the law of 1946 does not cover restrictive practices in the field of joint purchasing of goods (such as were expressly included in the types of restrictive business practices listed in Article 46 of the ITO charter). Further agreements which solely affect foreign markets (export cartels) and wage agreements in the labor market, are exempt from registration. Such types of restraint of trade as exclusive or tying agreements, boycott measures, and restrictions on the establishment of new businesses by private traders are also exempt.

A special parliamentary commission was therefore appointed in 1946 to study these problems and to draft a supplementary law to limit these types of restrictive practices. The main question for the commission to decide has been whether or not private control of the establishment of new firms in different trades (so-called *Nyetableringskontroll*) should be removed by law.[4]

In 1948, the commission received enlarged instructions to supplement the existing cartel law of 1946, especially to draft a proposal for a new agency or board with the power to judge whether "harmful effects" are created by the registered agreements. In July, 1951, the commission finished its work, presenting an extensive analytic study of economic concentration in Swedish trade and industry together with a draft for a new more far-reaching cartel law.[5] The committee draft which lead to the law of 1953, with the title "Law to counteract certain cases of restraint of trade within the national economy,"

[4] Swedish trade organizations, especially in the retail trade, often make careful investigations before giving permission to an individual to enter the retail market and start new shops. They inquire whether the applicant has sufficient professional background, adequate capital, a suitable location for his new business, and whether the trade in question will be unduly enlarged by new enterprises. A businessman acting against the will of these organizations is often exposed to various organized counter-measures, including organized boycott of supplies, price-cutting, etc.

[5] Konkurrensbegränsning, Betänkande med förslag till lag om skydd mot samhählsskadlig konkurrensbegränsning, avgivet av Nyetableringssakkunniga, del I, II, Stockholm 1951.

embodied an approach to eliminate certain specific types of abuse of monopoly power, further defined by the law.[6]

The law has two basic concepts: "the interests of the community" (public interest) and "harmful effects" of restraint of competition. Public interest is explicitly identified with consumer interest. The interests of the private producer or dealer can be taken into account, but only as subsidiary to the general consumer interest. This definition of public interest is not to be found in the law itself, but is stated in the report of the Committee.

The concept of "harmful effects" is, however, exhaustively defined in the first paragraph of the new law. Such harmful effects are caused when the restriction of competition from a point of view of public interest either:

(1) "unreasonably influences the fixing of prices" (which can lead to unwarranted high prices in relation to actual costs of production),
(2) "hampers the efficiency of the national economy" (which can prevent or impede cost reduction, bring about increases of costs, or otherwise counteract technological or economic progress), or
(3) "obstructs or prevents the entry or practising of a profession by other persons" (for instance by refusing to deliver goods or by other boycott measures).

The new law provides for investigations by a special supervisory quasi-judicial agency (Free Trade Board). It is important to observe that this new state authority has no power to undertake investigations on its own; it has to await complaints made by injured parties—consumers' organisations, trade unions, or individual business or property interests—or references to it from an entirely new type of official, called "Commissioner for Free Trade Matters" (*Ombudsman för näringsfrihetsfrågor*), who is a kind of independent public prosecutor, responsible to no individual government agency.

The monopolistic practices defined in the law cover the activities of monopolistic combines, cartels, and trade associations. When cases of restrictive practices are brought before the agency, it has to weigh the evidence produced by the Commissioner for Free Trade Matters or by the complaining party, to undertake investigations (with the assistance of the Cartel Control Bureau), and to decide whether an intervention is, or is not, to be made.

Two special types of restrictive business practices have been definitely prohibited by the law:

(1) the practice of enterprises to submit common uniform tenders or biddings for the sale of goods or services agreed on in advance (*anbudskarteller*) and
(2) the maintenance of minimum resale prices for branded goods by producers or traders (*bruttoprissystemet*).

Exemptions from the general prohibition of resale price maintenance or uniform bidding agreements can be granted by the Free Trade Board only if "the restraint of competition can be assumed to foster cost savings, which sub-

[6] Svensk Författningssamling 1953: 603.

stantially are made for the benefit of the consumers, or otherwise contribute towards regulations appropriate to the public interest." All applications for exemptions made thus far have been turned down by the Board.

Certain other categories of restrictive business practices are pointed out in the law of 1953 as undesirable and subject to negotiation before the new supervisory agency. The groups of restrictive practices singled out in §§ 5 and 6 in this way, are: price or sales discrimination by monopolistic combines, agreements on the fixing of prices, when they substantially influence price-setting, division of markets (generally), and discrimination against certain entrepreneurs by cartel organisations or monopolistic enterprises.

The law presupposes that, in these and all other cases brought before the supervisory Free Trade Board, the first stage will be to arrive at a voluntary settlement by *negotiation* with the defendant party. The main types of special orders (not mentioned in the law) may require the defendant party to terminate or amend cartel agreements; to abstain from refusing to sell to an entrepreneur or a group of entrepreneurs; to refrain from entering into business connections with other entrepreneurs; to cease from discriminating in price or in other ways favoring certain selected entrepreneurs; or to modify any procedure or to adopt any special procedure deemed necessary as remedial action. If, however, the results of such negotiation are not considered to be sufficiently effective in a particular case and the harmful effects have not been removed, the Board has the duty to report the facts to the Government, provided the case is considered to be of great importance (§21).

The agency known as the Free Trade Board (*Näringsfrihetsrådet*) created by the new law of 1953 consists of nine members. Three of the nine members, two legal experts and one economist, are to have permanent seats, whereas the remaining six are to be chosen for a period of three years. Three members of these remaining six are to represent the general consumer or employee interests and three the interests of the entrepreneurs.

The law of 1953 applies to all branches of private enterprise, including trade, industry, agriculture, transport, banking, and insurance. State and municipally owned enterprises are affected only to the extent that they engage in restrictive practices in the market of goods, without being authorised by ordinary law or state ordinances to do so. Agreements between employers and employees on wages and other working conditions are exempted from the application of the new law.

The submitted proposal for the new law was signed by a majority of the special Committee. On May 21, 1953, both houses of the Swedish Parliament voted for the law by a great majority. The law came into force on January 1, 1954, the special provisions prohibiting the two special forms of restraint of trade mentioned on July 1, 1954.

FREDRIK NEUMEYER*

* Head of the Patent Section of the Swedish State Telephone and Telegraph Administration, Stockholm.

Digest of Foreign Law Cases

Special Editor: MARTIN DOMKE

American Foreign Law Association

Acchione, Petition of, 213 F. 2d 845 (3rd Cir. June 10, 1954): father's reacquisition of Italian nationality by virtue of art. 9(3) of Italy's Nationality Law of 1912; expatriation of Italian-born daughter by voting in 1946 Italian election. See, generally, Note: *"Voluntary": A Concept in Expatriation Law*, 54 COL. L. REV. 932 (1954).

Albert v. Brownell, U. S. Ct. App. 3rd Cir., No. 13651, June 30, 1954: stockholder's rights in assets of Luxembourg corporation; non-enemy character of stockholder; summary judgment (104 F. Supp. 891) vacated for lack of federal jurisdiction.

Am. Smelting and Refining Co. v. Philippine Airlines, Inc., Manila, 131 N.Y.L.J. June 21, 1954, 6 col. 7: loss of gold shipment from California to Salt Industry Bank of Szechuen, Hongkong, through aircraft crash near Hongkong airport; application of Warsaw Convention of 1929, 49 U.S. Stat. 3000; insertion of "agreed stopping places" in air waybill.

American Tobacco Co. v. The Katingo Hadjipatera, 211 F. 2d 666 (2d Cir. April 9, 1954): exceptions to taxation of costs, where suggestion of sovereign immunity made on behalf of Greek government was overruled, as no possession of vessel was taken under requisition until after attachment (119 F. 2d 1022).

Anderson v. Speyer, 131 N.Y.L.J., June 3, 1954, 7 col. 3: final judgment on accounting and discharge of International Committee of Bankers on Mexico (1922) regarding defaulted Mexican securities.

Andrew, Estate of John H., Jr., 132 N.Y.S. 2d 571 (Surr. Ct. June 21, 1954): non-recognition of Mexican divorce where no bona fide residence of deceased in Mexico was acquired and wife neither appeared nor was served with process in that jurisdiction.

Aronstamm v. Zack, 132 N.Y.L.J., August 20, 1954, 6 col. 1: deposition of plaintiff domiciliary of Johannesburg, South Africa.

Aufhauser, Estate of Siegfried A., 132 N.Y.L.J. July 28, 1954, 2 col. 8: validity of assignment of German restitution claim pursuant to Military Law No. 53.

Bach v. Zeit, 131 N.Y.L.J. June 2, 1954, 7 col. 6: whether instrument was a last will or merely an assignment under German law.

Bank of Nova Scotia v. San Miguel, 214 F. 2d 102 (1st Cir. June 21, 1954): conflict of law rule of Puerto Rico as to negotiable instrument; sale of Dominican sugar to Tangier, Spanish Morocco; Dominican law on bill of exchange (art. 166 Code of Commerce of the Dominican Republic).

Banking & Trading Corp., Limited v. Reconstruction Finance Corporation, 15 Federal Rules Decisions 360 (S.D. N.Y. Jan. 8, 1954): capacity of Indonesian corporation to sue; bar by statute of limitations from amending complaint to bring action as association or partnership.

Bantel v. McGrath, 215 F. 2d 297 (10th Cir. August 18, 1954): no intervention of trustee under Sec. 17 of Trading with the Enemy Act to challenge powers of Alien Property Custodian to vest property of German nationals administratively determined to be enemy-owned.

Barber v. Gonzales, 347 U.S. 637 (June 7, 1954): application of Philippines Independence Act of 1934 as to Filipinos then residing in the United States.

Bartels, Estate of Louis S., 131 N.Y.L.J. June 8, 1954, 7 col. 8: Dutch law as to the disposition of American assets of decedent domiciled in the Netherlands (N.Y. Dec. Est. Law. sec. 47).

Baruch, Matter of Herman B., dec'd, 205

Misc. 1122, 132 N.Y.S. 2d 402 (Surr. Ct. Suffolk County Aug. 4, 1954): judicial notice of Dutch law of inheritance (sec. 344-a N.Y. Civil Practice Act); validity of an antenuptial agreement made in 1949 in the Netherlands.

Berweger v. Berweger, 131 N.Y.L.J. June 4, 1954, 7 col. 7: proof of German law, as that of residence of German wife, on recognition of foreign (Nevada) divorce.

Borden v. United States, 116 F. Supp. 873 (Ct. Cl. Dec. 1, 1953): suit by chief accountant of American Army Exchange Service European Theater to recover salary withheld for reimbursement of loss, on ground of negligence, resulting from theft of Deutschmarks at post exchange in Bremerhaven, Germany.

Brownell v. Bank of America National Trust and Savings Association, 22 U.S. LAW WEEK 2601 (D. Col. Cir. June 10, 1954): interest on bills of exchange of German corporation (J. A. Henckels, K.G.); debt claim asserted against vested German property.

Brownell v. Gutnayer, 212 F. 2d 462 (D. Col. Cir. April 22, 1954): status of alien who had been admitted as accredited official of foreign government under Displaced Persons Act of 1948 as amended, 50 U.S.C.A. App. §1953.

Brownell v. The City and County of San Francisco, 271 P. 2d 974 (Cal. App. June 21, 1954): application of art. 19 of Treaty with Germany of 1923 (immunity from taxes on real property operated by Germany for governmental purposes) not suspended or abrogated in World War II.

Bruni v. Dulles, 121 F. Supp. 601 (D. Col. May 13, 1954): expatriation by service with Italian armed forces; oath of allegiance to Italy and voting in Italian elections. See, generally, Note in 54 COL. L. REV. 932 (1954).

Callwood v. Virgin Islands Nat. Bank, 121 F. Supp. 379 (D. Virgin Islands Feb. 15, 1954): assignment of blocked funds located in Virgin Islands bank, executed in Germany, not effective when license under Military Law No. 53 only obtained after institution of court action.

Canadian Indemnity Co. v. United States Fidelity & Guaranty Co., 213 F. 2d 658 (9th Cir. June 15, 1954): "excess insurance" clause in Canadian liability policy.

Central-Cinema Film Comp. v. Comet Television Films, Inc., 132 N.Y.L.J. July 26, 1954, 2 col. 7: contract subject to approval by the German Government Export-Import Agency.

Commissioner of Internal Revenue v. Rivera's Estate, 214 F. 2d 60 (2d Cir. June 10, 1954): will executed and probated in Puerto Rico; assets in U. S. belonging to estate of citizen both of U.S. and Puerto Rico, domiciled in Puerto Rico at time of death, exempt from federal estate tax.

Compania Maritima Ador, S.A. v. New Hampshire Fire Ins. Co. of Manchester, N.H., 120 F. Supp. 577 (S.D. N.Y. April 26, 1954): Panamanian resident's claim for losses on voyage from Durban, South Africa to Baltimore.

Compania Maritima Astra, S.A. v. Archdale, 131 N.Y.L.J. June 28, 1954, 5 col. 5: suit of Panamanian company against Lloyds' of England for constructive total loss of liberty ship off Cuban waters.

Costi v. Costi, 131 N.Y.L.J. June 17, 1954, 6 col. 8: bona fide residence in Mexico not questionable where one spouse appeared personally and the other by duly authorized counsel in Mexican divorce jurisdiction.

Crescimanno, Matter of Bartolomeo, dec'd, 132 N.Y.L.J. August 10, 1954, 4 col. 5: motion of Deputy Consul General of Italy at New York to complete jurisdiction on expense of estate.

Cruz v. Harkna, 122 F. Supp. 288 (S.D. N.Y. May 7, 1954): Honduran law governing compensation for injuries and illnesses sustained by seaman.

Danziger v. Danziger, 131 N.Y.L.J. June 18, 1954, 11 col. 8: no recognition of Mexican divorce when husband was not domiciliary of Mexico at commencement of divorce action.

Davis v. Asano Bussan Co., 212 F. 2d 558 (5th Cir. April 30, 1954): Japanese export corporation estopped from defense of being alien enemy corporation under supervision of American Eighth Army Headquarters and therefore not authorized to do business in Texas.

Derecktor v. U. S., 23 LAW WEEK 2039 (Ct. Cl. July 13, 1954): no liability for delay in approval of transfer of ship to foreign registry when State Department's embargo was caused by belief that ship would be used to run British blockade against excessive immigration to Palestine.

Di Benedetto v. Di Benedetto, 132 N.Y.L.J. July 2, 1954, 8 col. 1: validity and effect of Italian separation decree as res judicata on New York action for absolute divorce; authentication of record of Italian proceedings.

Digmala Lumber Co., Inc. v. Brownell, D. C. Col. Civil Action No. 5855-53, June 8, 1954: contract for lumber sales of Philippine corporation to Japanese corporation, licensed to do business in the Philippines during Japanese occupation, as an executory contract.

Du Roure v. Alvord, 120 F. Supp. 166 (S.D. N.Y. Feb. 16, 1954): French law as to vesting of title to all property of deceased domiciliary of France in his daughter, a French citizen and resident of New York, at time of death.

Ehrlich v. German Sav. Bank & Clearing Ass'n, 132 N.Y.L.J. Aug. 2, 1954, 5 col. 3: irrevocable appointment of Corporation Trust Company as process agent of German bond debtor only effective for suits by co-trustee or trustee.

Esso Standard Oil Co. v. United States, 122 F. Supp. 109 (S.D. N.Y. June 10, 1954): collision off Casablanca, French Morocco, of vessels carrying cargo for use of Allied Expeditionary Forces in North Africa in 1942, not consequence of "hostilities or warlike operations" within war risk policy.

Eyre, Matter of (*Bankers Trust Co.*), 132 N.Y.L.J. July 1, 1954, 3 col. 3: rights under trust indenture executed in England for benefit of resident of England.

Fergus Motors, Inc. v. H. L. Arnes & Co., 131 N.Y.L.J. May 27, 1954, 7 col. 2: New York distributor of British auto manufacturing corporation not an agent; service of summons quashed.

French American Banking Corporation v. Isbrandtsen Company, Inc., 307 N.Y. 616, 120 N.E. 2d 826 (N.Y. May 20, 1954): non-performance of letter of credit-obligations of Banque de l'Indochine in Tientsin, China.

Gagliormella v. Metropolitan Life Ins. Co. 122 F. Supp. 214 (D. Mass. June 25, 1954): U. S. marine's death in Korea on Oct. 31, 1952 occurred, under Massachusetts law, in time of "war" within meaning of life insurance policy excusing insurer from liability for additional death benefits.

Gower, Estate of Constance B., 132 N.Y.L.J. August 10, 1954, 2 col. 7: legal services by attorneys in France and in England.

Grancolombiana, Inc. v. Caravan Shipping Corp, 131 N.Y.S. 2d 786 (City Ct. N.Y. April 11, 1950): legality of agreement for shipping of barbed wire to Venezuela without export license under Second General Revision of Export Declarations, 10 Fed. Reg. 4418, 4464.

Hart v. Gould, 119 Cal. App. 2d 231, 259 P. 2d 49 (1953): Treaty of Guadeloupe Hidalgo of 1848, 9 Stat. 922, determines question of title to real property by reference to Mexican law at time property was acquired, but not as to restriction upon use embodied in a Mexican grant of 1839. Note in 27 SO. CAL. L. REV. 338 (1954).

Hellmann, In re H.'s Trust (*Title Guarantee & Trust Co.*), 132 N.Y.S. 2d 254 (Sup. Ct. June 17, 1954): reservation of trust settlor's rights to return of trust property in case German nonresident beneficiaries predeceased him, does not prevent seizure under Trading with the Enemy Act, as amended 40 Stat. 411.

Hesse v. American and European Agencies,

Inc., 131 N.Y.L.J. June 9, 1954, 14 col. 1: commission to be taken before the U. S. Army Director of Legal Affairs Allied Military Government, Trieste.

Heubach, Matter of Gustave H., dec'd, 132 N.Y.L.J. Sept. 2, 1954, 8 col. 5: effect of war and vesting on bequests to German municipalities.

Hudspeth County Conservation & Reclamation Dist. No. 1 v. Robbins, 213 F. 2d 425 (5th Cir. May 27, 1954): obligation of United States under Convention with Mexico of 1906, 34 Stat. 2953, for delivery of water to Mexico from the Rio Grande.

Hutchinson, Matter of Arianna M., dec'd, 132 N.Y.L.J. July 15, 1954, 4 col. 7: interpretation of will probated in England as to distribution of trust fund.

Hyam v. American Export Lines, Inc., 213 F. 2d 221 (2d Cir. May 6, 1954): burden of oral deposition in New York of resident of Bombay, India.

Indusa Export Co., Inc. v. Indussa Corp., 131 N.Y.L.J. June 28, 1954, 4 col. 5: rights of parties in export business to use of name Indusa, combination of part of the word "India" and the abbreviation "U.S.A."

Insurance Co. of North America v. United States, 121 F. Supp. 649 (Ct. Cl. June 8, 1954): effect of French Spoliation Act of 1885, 23 Stat. 283, upon French spoliation claims from judgments of French prize courts, under Treaty with France of 1800, 8 Stat. 178.

Isenburg, Estate of Berta von I., 132 N.Y.L.J. July 6, 1954, 3 col. 8: 1935 bequest of German marks converted into U. S. dollars at current rate of exchange.

Jefferson Ins. Co. v. Cia. Colonial de Navegacao, 121 F. Supp. 828 (S.D. N.Y. June 17, 1954): clause in bill of lading providing for suit solely in Portugal not controlling upon New York subrogee of cargo owner.

Jewtraw v. Hartford Accident and Indemnity Company, 284 App. Div. 312, 130 N.Y.S. 2d 745 (3rd Dept. June 18, 1954): effect of Canadian statute absolving motor vehicle owner from negligence liability to "gratuitous passenger" in car accident in Province of Ontario.

Joachim, Estate of J., 23 U.S. LAW WEEK 2054 (U. S. Tax Court, July 14, 1954): German citizen's remainder interest in trust whose corpus was deposited in New York bank and vested by Alien Property Custodian, did not deprive her of interest in its exemption from estate tax under sec. 863(b) Internal Revenue Code.

Kalman, Estate of Emmerich K., 131 N.Y.L.J. June 9, 1954, 9 col. 6: examination of London physician by interrogatories.

Kutay, Petition of K., 121 F. Supp. 537 (S.D. Cal., May 28, 1954): Turkish visitor student having claimed exemption from service in Armed Forces as national of neutral country not barred from naturalization; guardian-like power exercised by Turkish government.

Kunitzer, Estate of Robert K., 132 N.Y.L.J. July 12, 1954, 2 col. 7: payment to Wiener Hauskrankenpflege, a newly formed charitable organization.

R. Kupsch, New York, Inc. v. Cie. D'Exploitations Commerciales Africaines, S.A., 132 N.Y.L.J. July 14, 1954, 3 col. 3: foreign law on statute of frauds under Standard Contract of the Cocoa Merchants' Association of America, Inc.

La Fayette v. American Pac. S.S. Co., Inc., 121 F. Supp. 543 (S.D. Cal. June 4, 1954): damage suit of seaman under Jones Act and General Maritime Law (unseaworthiness) permissible without allegation that vessel was owned by citizen of U.S.

Lake Ontario Line Development & Beach Protection Association, Inc. v. Federal Power Commission, 212 F. 2d 227 (D. Col. Cir. Jan. 29, 1954): license for construction of dam across St. Lawrence River; International Joint Commission created by Canada and U.S. under Boundary Waters Treaty of 1909, 36 Stat. 2448.

Lenn v. Richê, 1954 Advance Sheets 115 (Mass. Sup. Jud. Ct. Febr. 1,

1954): French law as to exception to statute of frauds where relationship of parties would make it morally impossible to obtain a writing for safekeeping of art objects in France.

Magner v. Hobby, 132 N.Y.L.J. August 19, 1954 (2d Cir. July 13, 1954): belief in lawful dissolution of former marriage by Mexican divorce; insurance benefits of legitimate child of decedent under Social Security Act.

Malherbe, Estate of William, 132 N.Y.L.J. July 7, 1954, 3 col. 2: transmittal of originals of testamentary instruments for completion of French proceedings.

Marcello v. United States, 212 F. 2d 830 (5th Cir. May 6, 1954): no absolute right of resident alien to remain in the United States.

Martin v. Martin, 131 N.Y.S. 2d 96 (Sup. Ct. April 20, 1954): declaratory judgment as to marital status when separation decree was obtained prior to divorce decree of Mexican court.

Mauderli, In re, 122 F. Supp. 241 (N.D. Florida June 28, 1954): effect on naturalization of Swiss national's exemption from military service in U.S. under Commercial Treaty with Switzerland, of Nov. 25, 1850, 11 Stat. 587.

McGrath, Application of, 132 N.Y.S. 2d 54 (Surr. Ct. Ulster County June 28, 1954): Alien Property Custodian not entitled to funds bequested to testator's sister in Germany, only to so much as she requested (up to stated maximum), which beneficiary had not requested.

Meb Export Co., Inc. v. National City Bank of N.Y., 131 N.Y.L.J. June 30, 1954, 4 col. 6: letters of credit for sale of forging billets "f.o.b. shipper's port in Germany".

Meyer v. Finley, 283 App. Div. 1017 (1st Dept., June 8, 1954): interrogatory to be addressed to former client in Switzerland as to lawyer's percentage agreement.

Miladin v. Istrate, 11 N.E. 2d 12 (App. Ind. April 29, 1954): no application of national policy that citizen and resident of Roumania, an alien enemy, cannot prosecute action during war in American courts.

Mitchell, Matter of David, dec'd, 131 N.Y.L.J. June 29, 1954, 8 col. 2: construction of will on payments to nephews in Scotland and Canada.

Mulsztajn, Estate of Abraham, 132 N.Y.L.J. July 7, 1954, 3 col. 1: domicile of deceased in Belgium.

Newtown Jackson Co., Inc. v. Barclays Bank (Dominion, Colonial and Overseas), 132 N.Y.L.J. Aug. 23, 1954, 5 col. 5: agent domiciled in Nigeria, West Africa, for purchase of lead in custody in Antwerp, Belgium.

Nicaraguan Long Leaf Pine Lumber Co., Inc. v. Moody, 211 F. 2d 715 (5th Cir. March 31, 1954): law of Curacao, Netherlands West Indies, not applicable to general average contribution from vessel for jettison of deck cargo since law of general average is part of the maritime law or law of the sea, as distinguished from the municipal law or law of the land.

N. V. Levensverzekering-Maatschappij van de Nederlanden v. United States, 121 F. Supp. 116 (D. Conn. March 23, 1954): reciprocity as to right to sue for overpayment of taxes in Dutch courts; application of tax treaty with the Netherlands of 1948.

Orlow, Matter of Joseph, 131 N.Y.L.J. June 2, 1954, 12 col. 2: deposit of share of distributee resident of Poland, pursuant to sec. 269 N.Y. Surrogate's Court Act.

Ostermeier, Estate of Markus, 132 N.Y.L.J. July 21, 1954, 3 col. 5: son's interest, under German law, in his father's distributive share.

Overseas Raw Materials Corp. v. Coster, 132 N.Y.L.J. July 6, 1954, 3 col. 7: oral agreement relating to organization of Panamanian corporation.

Paduano v. Yamashita Kisen Kabushiki Kaisha, 120 F. Supp. 304 (E.D. N.Y. March 31, 1954): action against Japanese shipping corporation for injury in Brooklyn, N.Y., arising under maritime law governed by admiralty principles.

Partenreederei Wallschiff v. The Pioneer,

120 F. Supp. 525 (E.D. Mich. March 22, 1954): collision between German and American ships in Canadian waters; reference to Canadian admiralty law.

Patenotre, Estate of Raymond, 132 N.Y.L.J. July 21, 1954, 3 col. 1: allowances in ancillary administration based on holographic will established in France.

Patsouratis v. Atlantic Bank of New York, 132 N.Y.L.J. July 13, 1954, 2 col. 8: Greek law as to direct right to decedent's property without intervention of administrator or executor.

Pennson Internat. Corporation v. Brugger, 131 N.Y.L.J. May 27, 1954, 7 col. 1: refusal to verify certificates of "end use" for aluminum to be shipped from Norway to Belgium; attachment of New York funds by Swiss bank.

People ex rel. Bell v. Martin, 131 N.Y.S. 2d 1 (4th Dept. May 19, 1954): violation in Province of Ontario of sec. 458-a of Canadian Criminal Code (not to be construed as felonies).

People ex rel. Latraverse v. Jackson, 132 N.Y.S. 2d 115 (3rd Dept. July 8, 1954): certificate of conviction in Canada for violation of sec. 461 Criminal Code of Canada (breaking and entering a store).

Pinaud v. Dampskslsk Dania A/S., 122 F. Supp. 51 (S.D. N.Y. June 7, 1954): Danish steamship corporation bound by service upon New York broker as "managing agent".

Prudential S.S. Corp. v. United States, 122 F. Supp. 164 (S.D. N.Y. June 2, 1954): stranding off Casablanca, French Morocco of vessel also carrying cargo consigned to Genoa, Italy; no general average contribution from United States as owner of part of cargo.

Republic of China v. Central Scientific Co., 120 F. Supp. 924 (N.D. Ill. May 13, 1954): attorney fees in suit of adverse claimants (nationals of China) to fund held by stakeholder.

Rock v. Rock, D.C. Iowa, Woodbury County, No. 75923, June 3, 1954: assignment of interest of German non-resident beneficiaries in their distributive shares in American estate ineffective for lack of U. S. Treasury license.

Rodriguez v. A. H. Bull S.S.Co., 132 N.Y.L.J. Sept. 16, 1954, 6 col. 8: statute of limitations of Puerto Rico, situs of accident in tort action between non-residents.

Rohmer v. Commissioner of Internal Revenue, 21 T.C. No. 123 (U. S. Tax Court, March 31, 1954): sale of serial rights to a novel by non-resident British author for use in Canada.

Romanian Orthodox Missionary Episcopate of America v. Trulza, 120 F. Supp. 183 (N.D. Ohio, July 8, 1952): surrender of church property to Bishop of Romanian religious organization in the United States and Canada.

Sachs, Matter of Maximilian Walter, dec'd, 131 N.Y.L.J. June 23, 1954, 9 col. 1: denial of motion for commission to take testimony of resident of Holland ("The Surrogate is of the opinion that an expert on the Dutch law can be obtained in New York City").

Savoretti v. United States ex rel. Pincus, 214 F. 2d 314 (5th Cir. June 28, 1954): misstatement of former native of Austria-Hungary, now stateless, a resident of U.S. since 1900, as to U.S. citizenship.

Schmiedigen v. Weinberg, 132 N.Y.L.J. July 29, 1954, 2 col. 7: taking of testimony of officials of agencies of the government of the Republic of Haiti.

Schumann v. Loew's, Inc., 132 N.Y.L.J. Oct. 21, 1954, 7 col. 4: damage suit by great-grandchildren of composer Robert Schumann for exhibition of motion picture "Song of Love;" insufficient proof of foreign law as to right of privacy.

Schroeder Bros., Inc. v. The Saturnia (Italia Societa Anonima Di Navigazione), 123 F. Supp. 282 (S.D.N.Y. July 21, 1954): application of Carriage of Goods by Sea Act to damage to shipments of fresh chestnuts from Naples, Italy, to New York.

Shee, Estate of Lee, 132 N.Y.L.J. Oct. 6, 1954, 7 col. 8: distribution in accordance with law of China.

Shnek v. Coronado Handbag & Novelties Corp., 132 N.Y.L.J. August 2, 1954, 4 col. 4: corporation of the Commonwealth of Puerto Rico not doing business in New York.

Siegler, Matter of, 284 Misc. 436, 132 N.Y.S. 2d 392 (3rd Dept. July 8, 1954): payment of legacies refused to Hungarian Consul for transmission to Hungarian legatees; Commercial Treaty with Hungary of June 24, 1925, 44 Stat. 2441, as revived in 1947 by art. 10 of the Treaty of Peace with Hungary, 61 Stat. 2115, in effect at time of decedent's death (March 20, 1952), and expired July 5, 1952, not binding as to procedural matters.

Siegmeier v. Societe Nationale, 132 N.Y.L.J. August 25, 1954, 2 col. 6: unreasonable burden on its foreign commerce to require defendant to transport all records to this state for its defense.

Simonowycz v. United States of America, 1954 AMC 1567 (N.D.Ohio, July 14, 1954): Polish national must show, under 46 U.S. Code sec. 781, that American national could sue on same basis in Poland.

Sociedad Armadora Aristomenis Panama, S.A. v. 5,020 Long Tons of Raw Sugar (Isbrandtsen Company, Inc.), 122 F. Supp. 892 (E.D. Pa., July 29, 1954): payment by Philippine sugar shipper to Philippine government as export tax under sec. 14 of the Philippine Tariff Act of 1946.

Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Brownell, D. Col. No. 4360-48, June 21, 1954: objections to interrogatories in suit for recovery of vested property of Swiss holding company allegedly enemy-tainted.

Spencer v. Jurzykowski, 123 N.Y.L.J. Sept. 27, 1954, 12 col. 8: examination before trial of plaintiff in France and of defendant in Brazil.

St. Paul Fire & Marine Ins. Co. v. The Motomar, 211 F. 2d 690 (2d Cir. April 5, 1954): admiralty action by insurer against Spanish corporation ship-owner; payment by deposit in Spanish bank in Spanish money as substantially complying with general average obligations.

Stephen v. Zivnostenska Banka, National Corp., 130 N.Y.S. 2d 791 (1st Dept. May 25, 1954): proof of ownership of bonds in suit against Czechoslovakian (nationalized) bank.

Stephens v. Stephens, 132 N.Y.L.J. August 9, 1954, 7 col. 2: non-recognition in Connecticut of Mexican mail-order divorce.

Stout, Matter of Sophie J., dec'd, 132 N.Y.L.J. July 2, 1954, 8 col. 1: legacy dependent on absence of "restrictions on the transfer of monies to Poland" to be interpreted as of date of testatrix's death (May 4, 1952, when there were no restrictions); deposit in Surrogate's Court pursuant to sec. 269 N.Y. Surrogate's Court Act.

Taejon Bristle Mfg. Co., Limited v. Omnex Corp., 13 F.R.D. 448 (S.D. N.Y. Jan. 3, 1953): examination of officers in Korea of defendant Korean corporation limited to written interrogatories.

Talmon v. Societatea Romana Pentru Industria De Bumbac, 132 N.Y.S. 2d 776 (Sup. Ct. Westchester County, June 23, 1954), 132 N.Y.L.J. Sept. 15, 1954, 12 col. 5: receivership pursuant to sec. 977-b N.Y. C.P.A. of two Roumanian corporations nationalized by Roumanian government.

Tanaka v. Brownell, 123 F. Supp. 31 (D. Idaho, July 21, 1954): oral agreement between Japanese nationals on interest in real property in Idaho; no title for return of vested Japanese asset.

Tee-Hitt-Ton Indians v. United States, 120 F. Supp. 202 (Ct. Cl. April 6, 1954): effect of acquisition of Alaska from Russia through Treaty of 1867, 15 Stat. 539, on original title of "identifiable group of American Indians".

Terada v. Dulles, 121 F. Supp. 6 (D. Hawaii May 19, 1954): dual nationality of Hawaiian-born citizen of U. S. and of Japan; conscription into the Japanese army not effecting forfeiture

of American citizenship. See, generally, Note, 54 COL. L. REV. 932 (1954).

Territory of Hawaii v. Shizuichi Yamamoto, 39 Hawaii Reports 556 (Sup. Ct. Hawaii, Oct. 29, 1952): "existence of war" within the meaning of sec. 11192, Revised Laws of Hawaii 1945 (unlawful possession of flags of enemy nation) continues until presidential proclamation of peace or ratification of peace treaty.

Toulouse, Estate of Adrien J., 132 N.Y.L.J. August 3, 1954, 2 col. 7: French law as to distribution of estates.

Uebersee Finanz-Korporation, A. G. Liestal, Switzerland v. Brownell, 121 F. Supp. 420 (D. Col. May 28, 1954): intervention of stockholder of Liechtenstein nationality in suit for recovery of assets of Swiss corporation vested as enemy-tainted property.

United States v. Chesapeake & Ohio Ry. Co., 215 F.2d 213 (4th Cir. Aug. 14, 1954); lend-lease export to China; impossibility of transport through fall of Rangoon, Burma, to the Japanese.

United States ex rel. Impastato v. O'Rourke, 211 F. 2d 609 (8th Cir. April 21, 1954): proof in deportation proceedings by Italian citizen that he had left Italy before July 1, 1924.

United States, Petition of. In re American Export Lines, Inc., 123 F. Supp. 741 (S.D.N.Y. June 11, 1954): sinking of U. S. vessel The Sawolka in 1942 by German raider; claims asserted in 1948 on account of crew in Japanese prisons until 1945 time-barred two years after 1945 end of war.

United States v. Rumsa, 212 F. 2d 927 (7th Cir. May 13, 1954): application of Universal Military Training and Service Act as amended, 5 U.S.C.A. App. §454(a), to former Lithuanian national admitted to the United States as a displaced person.

United States v. Sullivan, 213 F. 2d 765 (1st Cir. June 21, 1954): statute of limitations on claims for tax refunds suspended with regard to interest of German nationals which was vested by Alien Property Custodian.

United States v. Tanker Lake George, 23 U.S. LAW WEEK 2061 (D. C. Del. July 22, 1954): ban of sec. 9 Shipping Act of 1916 not applicable to sale of surplus tanker under Merchant Ship Sales Act to alien corporation which misrepresented its citizenship.

United States v. Tarantino, 122 F. Supp. 929 (E.D.N.Y. July 13, 1954): no revocation of citizenship of Italian naturalized through active duty service during World War II who had subsequently been dishonorably discharged.

United States v. Ushi Shiroma, 123 F. Supp. 145 (D. C. Hawaii, Aug. 12, 1954): Japan's retention of de jure sovereignty over Okinawa, under Treaty of Peace with Japan; person born in Okinawa of Okinawan parents did not become a national of U. S.

Vista Terrace Homes Corp. v. Villeneuve, 132 N.Y.L.J. July 1, 1954, 6 col. 5: rescission of real estate contract owned by defendants' testator who died a resident of Canada.

The Warner Brothers Company v. United States, 214 F. 2d 429 (2d Circ. July 29, 1954): taxation of German blocked Reichsmarks as deductible war-loss under sec. 127(a)(2) Internal Revenue Code.

Wasserberger v. Wasserberger, 132 N.Y.L.J. August 5, 1954, 4 col. 3: non-recognition of Mexican divorce for lack of Mexican jurisdiction.

Wennerholm v. Thiberg, 132 N.Y.L.J. Sept. 28, 1954, 5 col. 5: depositions in Denmark (by written interrogatories).

Wilson v. Kennedy, 123 F. Supp. 156 (D.C. Guam, Aug. 31, 1954): territorial income tax to be collected by proper officials of territorial government.

Wirth, In re W.'s Estate, 132 N.Y.S. 2d 98 (Surr. N.Y. June 18, 1954): value of bequest of 5,000 German goldmarks to German resident to be measured at date will was executed.

Wohlmann, Estate of Anschel, 132 N.Y. L.J. Oct. 20, 1954, 8 col. 4: residence of deceased in Belgium.

Young, Matter of, 284 App. Div. 406, 131 N.Y.S. 2d 499 (1st Dept. June 15,

1954): open commission, in disbarment proceedings, of attorney's Italian client residing in France.

Yokohama Specie Bank, Ltd., In the matter of liquidation of business and property in New York, 307 N.Y. 810, 121 N.E. 2d 631 (N.Y. July 14, 1954): bank's status as national of designated enemy country (Japan): discharge of Superintendent of Banks of State of New York.

Zumsteg, Petition of, 122 F. Supp. 670 (S.D.N.Y. July 23, 1954): objection of German national to war-time military service not equivalent to application for exemption so as to bar from ever becoming a U. S. citizen; petition for naturalization granted.

Book Reviews

ROSENBERG, L. *Die Beweislast auf der Grundlage des Bürgerlichen Gesetzbuches und der Zivilprozessordnung*. 3rd ed. München: Verlag C. H. Beck, 1953. Pp. vi, 407.

ROSENBERG, L. *Lehrbuch des deutschen Zivilprozessrechts*. 6th ed. München: Verlag C. H. Beck, 1954. Pp. xvi, 1109.

I. In the realm of law, it does not happen too often that an eminently scholarly monograph reaches three editions. *Die Beweislast* was first published in 1900. The second "revised" edition followed in 1923, and now we are presented with the "third entirely new-prepared edition." The intervals between the editions are long. Very early in his life Dr. Rosenberg's interest in the subject was kindled, an interest which, as the years of the editions show, was pursued with enthusiasm and faith throughout more than half a century.

In this work, in the first place, the author has attempted to distinguish many questions genuinely related to proving facts from problems with which they are often confused conceptualistically or ideologically. In this edition, the principles controlling the burden of proof are definitely assigned their proper place within the substantive (in contrast to the procedural) part of law. These principles deal with questions related to the application of a substantive norm to a given situation because such application presupposes the ascertainment of the existence of the factual premises specified in the norm. (See especially pp. 116 ff.) A party bears the risk of the nonapplicability of a legal norm which is favorable to his claim if such factual premises are not established. This risk is the real problem which is called "burden of proof" ("objective" or "material burden" or "*Feststellungslast*").

In the second place, the author has brought into sharp focus the distinction between this concept and the question whether there is a procedural duty on the part of a party to come forward with evidence ("burden" in the subjective sense). The author correctly states that, unlike himself, the Austrian proceduralists, without exception, deny the existence of a burden in this latter sense. An Austrian court will admit evidence offered only by the adverse party to prove the nonexistence of the factual premise in case the proponent fails to offer evidence of its existence. Although Professor Rosenberg denies this to be true for German law—he thinks that a German court would not admit such evidence—he makes it clear that the significance of the problem lies in the ascertainment of a fact. "It is immaterial through whom evidence of such premise has been brought; only the question whether there was proof is material."

A third task undertaken by the author is the demarcation between the area of the burden problem and that of the evaluation of evidence. In the first place, Joseph Kohler's doctrine is just as emphatically rejected in this as in the prior edition. Kohler and his followers believed that, upon the adoption of the principle of free evaluation of evidence, all rules on burden of proof became obsolete. Nevertheless, Professor Rosenberg also admits that the principle must be

given a dominant place in the process of fact-finding. He reminds us (p. 180) that by virtue of this principle the judge regards a factual situation as proved which conforms to the ordinary course of nature, which means to common experience ("*Regel des Lebens*"). This explains also the treatment of prima-facie situations. All conclusions derived from rules of experience ("*Regel des Lebens*," "*Erfahrungssätze*") establish facts so that further proof can be dispensed with. Thus, the party in whose interest the contrary would militate, must really bear the risk of a lack of clear-cut proof of the nonexistence of such facts. Mere raising of doubts about their existence is not sufficient. Consequently, German law excludes examination of the parties as counterevidence (ZPO, Sec. 445 II). In absence of full disproof, such factual basis can not be attacked by an appeal to the highest court. In all these respects, facts assumed by way of legal presumptions, in other words rules of law, involve consequences contrary to those established by rules of experience. (See 208 ff.)

Here again, the author seeks to demarcate the two concepts. Legal presumptions obviate proof of the existence of what the law directs should be deemed proved. The free evaluation of all the contents of a proceeding enables a judge to regard an immense number of facts as proved. In consequence, a substantial amount of factual questions is, if I may say so, a priori covered before a question of burden will arise, in the sense of a gap in the factual basis required by one of the applicable rules. As seen in this light, the word burden is a misnomer. The rule is not applicable if its factual premise is not deemed by the judge to exist, irrespective of whether its application would favor the plaintiff or the defendant. The rules of substantive law indicate the position of a party, e.g. seller or buyer, whose interest calls foe the establishment of the factual premise. Thus, with all the respect due to Rosenberg's great book, it may well be questioned whether Kohler, who might have oversimplified the problem, after all, was too wide of the mark.

Among the most remarkable features of the book is the theory of presumptions. The starting point is, of course, the identification of a legal presumption with a legal norm. Reading American decisions, one is often startled because the writer of an opinion does not sufficiently recognize the fundamental difference between factual assumptions derived from the circumstances of a case ("inferences") or from common experience ("rules of experience"), on the one hand and factual presuppositions established by a rule of law (presumptions) on the other. Naturally, in most cases the lawmaker has been induced to enact a presumption on the basis of experience pointing to probabilities, but the absence of presumptions for the infinitely larger or, better, boundless area to which human experience extends, demonstrates the circularity of identifying one concept with the other. The difference is that between fact and law. Inferences founded upon common experience or upon proved facts are the result of evaluation of facts, whereas the application of a presumption rests on a process of pure legal reasoning (*Rechtsanwendung*). The practical importance of the theoretical distinction has been discussed above.

From this discussion, it can easily be observed why, for example, an American lawyer may find guidance in a book which is based on a law which is not familiar to him. The law of evidence deals, to a great extent, with certain basic concepts which are not peculiar to a particular legal order. The concept of the legal presumption is one of these. In examining the nature of such a presumption, it must be realized, as in this edition Rosenberg admirably explains, that the assumption of an essential, (presumed) fact is conditioned on the existence of a nonessential fact, a fact alien to the premises of the legal norm in question. For example, the legal norm in question may impose liability on the owner of a car driven with his consent by the party involved in a traffic accident. A presumption establishes the fact of the owner's consent from the fact that custody over the car was given by the owner. Rosenberg shows that the German and Austrian Codes often speak of "presumption" where there is none in the legal meaning. This is obviously the case also in this country; courts frequently speak of "presumptions" of innocence, of legitimacy, against suicide, against insanity, and so forth. Is there any "basic" fact? No. Only rules of law ("*Interimswahrheiten*"), burdening one of the parties with the risk involved in nonpersuasion of the trier regarding the existence of an essential fact, i.e. guilt, illegitimacy, suicide, sanity. The confusion of legal fictions—such as that of the agency of the secretary of state for a foreign motorist—with presumptions induced by statutory language, can be traced to the same misconceptions.

Space limitations bar detailed discussions of many topics included in the book. However, a few references may be appended. Dr. Rosenberg treats in a subchapter presumptions of the existence or nonexistence of rights (in contrast to those concerning facts), and conflicting presumptions. Then follows an extensive discussion of qualified admissions, particularly in cases in which the conclusion, effect, or contents of a legal transaction are in dispute. The last chapter deals with diverse questions related to burden problems, including proof of "negative facts," such as lack of legal capacity and performance of obligations as a ground of exculpation and culpability, of personal circumstances, e.g., the amount of assets, of procedural facts, and of facts pertaining to questions involving the statute of limitations.

II. The changes introduced in German legislation by the Law of September 12, 1950, restoring unity to German civil procedure, which had been interrupted during military occupation (1945–1950), and establishing the *Bundesgerichtshof* as the German Supreme Court, were taken into account in the preceding 1951 edition of Dr. Rosenberg's well-known *Lehrbuch*, the recent sixth edition of which is under review. In addition, this new edition also devotes attention to the recent law (1953 RGBl. I 952) concerning the law of enforcement of judgments, and to the changes attributable to the decision of the German *Verfassungsgerichtshof* to the effect that the proclamation of the Basic Law of 1949 (Bonn Charter, article 3, section 2) concerning the legal equality of women with men, became effective on March 31, 1953, the date fixed by the Basic Law, without requiring the enactment of a law to place the proclamation in effect.

Formerly, for example, a wife did not have capacity to conduct proceedings in court (*Prozessführungsbefugnis*) concerning her property to the extent that it was subject to the husband's management. Many other problems, e.g. that of the procedural capacity of representation in cases involving community property, can be handled only by legislation. A draft of such a law (*Familienrechtsgesetz*) has been prepared, but it has not yet progressed to the stage of enactment.

It is to be noted that, entirely in line with all the other continental treatises on the law of civil procedure, the author nowhere, as far as I could see, discusses the influence of those constitutional principles with which we deal in the name of "due process." According to the author, the right to notice and hearing is warranted by the possibility of an appeal to the highest court (p. 278). Yet is this not an "inviolable and inalienable human right" which should be basic in "every human community" (Basic Law, Article 1)? And what of Article 103 ("proper legal hearing")? And yet it was a civilian, an outstanding Latin-American legal scholar, Dean Eduardo J. Couture of the Law School in Montevideo, Uruguay, whose address on the constitutional protection of due process ("New Contributions to the Concept of Due Process") at the International Congress of Civil Procedure in Vienna constituted the great event of the Congress.[1] I hope that the time will come when Continental treatises also will devote some discussion to the problem and all the more so in countries where, as under the German Basic Law, statutory laws are subject to review by a Court for Constitutional Matters. (See Rosenberg, pp. 603.)

As for the contents of the treatise, the organization and the approaches to particular problems are the same as in the preceding edition. To say that the book is excellent would not be enough. It is a matter of general agreement that this standard work has hardly its equal among present treatises on German civil procedure. The fact that it has been translated into Spanish speaks for itself, although the work, aside from frequent references to Austrian law and occasionally to the procedural laws of other countries, is essentially devoted to German Law. Our proceduralists should certainly welcome a translation into English.

ARTHUR LENHOFF*

[1] The address has been published in full in 76 *Juristische Blätter*, nos. 10 and 11 (1954).

* Professor of Law, University of Buffalo.

ORFIELD, L. B. *The Growth of Scandinavian Law*. Foreword by Benjamin F. Boyer. Philadelphia: University of Pennsylvania Press for Temple University Publications, 1953. Pp. xx, 363.

Since the war Scandinavian institutions have increasingly attracted attention and interest in other countries, not least in the United States. The book under review is the first attempt to give an overall picture of the law of Scandinavia in a non-Scandinavian language. No wonder, therefore, that the book is of great interest to Scandinavians and non-Scandinavians alike.

In four chapters, the author treats Danish, Icelandic, Norwegian, and Swedish law. In the introduction, the author's reasons for not treating the law of Finland as Scandinavian are given, but they are not convincing. In its origin and organization, Finnish law is Swedish; the legislation, judicial development, and doctrine of Finland closely follow the trends in the other Scandinavian laws; Finland has adopted a number of the uniform Scandinavian laws; and Finnish lawyers participate in great numbers in the two permanent conferences of Scandinavian lawyers and law students which are held every three years in rotation in the five Scandinavian capitals to discuss subjects which seem to be ripe for Scandinavian co-operation.

Each of the four chapters is divided into sections on international relations, sources of law, the three branches of government, local government, religion, education, criminal law, private law, social legislation, uniform Scandinavian laws adopted in the country, legal education, and jurisprudence, with some subjects discussed more fully in one chapter, others in another.

A wealth of factual information is given in these sections on all aspects of Scandinavian life. The abundance of background information, historical, political, and social, will facilitate the study and understanding of Scandinavian character and mentality for anyone who reads the book.

This is a handbook of Scandinavian public life. In view of the width of the subject and the profusion of information it is impossible in a review to criticize in detail. The reader, however, may be assured that the information found in the book as a whole is reliable, although not always up-to-date. Thus, the Danish constitution was revised very thoroughly on June 5, 1953. The legislature is now unicameral; parliamentarism, which previously was a constitutional custom, has become part of the written constitution; the catalogue of human rights has been enlarged; female inheritance to the throne has been reintroduced one hundred years after it was abolished; Greenland has become a part of the kingdom and is no longer a colony; etc.

Another point on which the book is not quite up-to-date is in the reference to the reconciliation tribunals, for which the author has much sympathy. These have now been abolished in Denmark and the attempts to reconcile the parties are made in the courts themselves, constituting a very important part of Danish judicial activity, (and not because, as is sometimes a little maliciously said, if the parties are reconciled, the judge avoids the trouble of writing a judgment).

Also, some of the information is somewhat haphazard. This is especially true of the bibliographies, of which probably the Norwegian is the best and the Danish the least satisfactory: Norwegian authors are mentioned under Denmark and vice versa; unimportant review articles are noted, but not important books; thus, probably the leading contemporary Scandinavian author, Henry Ussing, is only cited in the bibliography for his least important book.

These are only minor flaws. The book has, however, for the reviewer raised a problem of more general character.

The years following the second world war have seen quite a new trend in

comparative law–writing, of which trend this book is a part. While the earlier writings were mainly concerned with particular legal problems as treated in various countries, a large number of books have been published in the post-war years introducing lawyers of one country to the law of another country and explaining the foreign law to them in terms which they know from their own law. France, under the influence of Professor René David, has been the leading force in this trend. In Scandinavia, we have had two such books, one by Judge Theodor Petersen on English law and administration of justice, and recently a very excellent book by the Norwegian Torstein Eckhoff on Law and Legal Science in the United States, a book which ought to be translated into English or French.

Various methods have been applied in writing these books. Some are "historical-jurisprudential," giving the reader a philosophical introduction and the necessary tools for grasping and working with the foreign law. Others are purely descriptive, explaining what the law is in the particular foreign country. Others again try to combine the two methods.

I think the most valuable method is the historical-jurisprudential, perhaps with a leaning to the descriptive method. A book written according to this "recipe" does not become out of date at least for a long time; it gives the reader a basis for further studies; and, perhaps most important, it enables the author to treat the foreign system of law from an academic-scientific point of view which may lead him to discoveries respecting and explanations of that foreign law or aspects of it, which are available only to the detached spectator.

The book under review belongs to the group of descriptive introductions. The author has tried to make it more than this by including the great amount of background material which has been mentioned above. But apart from the interesting chapter on Icelandic law, he has not succeeded in making the historical facts form a natural background for the representation of the law.

The main reason why this book, although an important contribution to comparative law-writing, can scarcely become *the* introduction to Scandinavian law is closely connected with this methodical question; the descriptive method has led the author to treat the law of each country individually. This has not only resulted in a number of repetitions, but it has deprived the author of the chance to show what is common in the Scandinavian laws, in what respects they differ from or are similar to Continental and Anglo-American law, which are their weak points and on which points may foreign laws learn from them. Each apart by itself, the Scandinavian systems of law are but curios in the great collection of laws, but seen as a single native-born system, thanks to their peculiar origin, development, and sources, they will prove to be on an equal footing with the two systems which in most comparative lawyers' eyes cover the whole of the Western law, the Continental and the Anglo-American. As already pointed out by professor Max Rheinstein, modern American law and Scandinavian law have many features in common. A study by an American lawyer of Scandinavian law and sources of law with special regard to the place

of judicial precedent and legal writing in these laws would be of the greatest interest.

In the meantime this book fills a gap. It will be an important source of information to legal scholars outside Scandinavia and we should be grateful to the author for the great amount of material he has made available to the student of comparative law.

ALLAN PHILIP*

* Lecturer, University of Copenhagen, Faculty of Law, Junior Member of the Danish Bar.

MANN, F. A. *The Legal Aspects of Money with Special Reference to Comparative, Private and Public International Law*. Second Edition. Oxford: The Clarendon Press 1953. Pp. xxxiv, 488.

SCHLESINGER, E. R. *Multiple Exchange Rates and Economic Development*. Princeton, N. J.: Princeton University Press (for International Finance Section) 1952. Pp. 76.

SHEPHERD, S. A. *Foreign Exchange In Canada. An Outline*, Toronto: University of Toronto Press, 1953. Pp. x, 232.

RIST, C. *Défense de l'Or*. Paris: Recueil Sirey, 1953. Pp. xii, 120.

1. Dr. Mann's *Legal Aspect of Money* is a truly important work. At the time of the publication of the first edition (1938), there was no comprehensive treatment of monetary law in the English language.[1] Arthur Nussbaum's great *Money in the Law*[2] was published in 1939, and rewritten in 1950. The second edition of Mann's book none the less fills a gap, not merely because it brings up to date and expands a book focusing primarily on English law while Nussbaum's book concentrates on American law, but because the approach and the organization of the material is different from that used by Nussbaum.

What makes the book absorbing is that Dr. Mann has the courage to skip descriptions he is not really interested in and, consequently, the reader senses the genuine interest of the author in the material. Instead of giving, e.g., a detailed description of the organization of the English monetary system, he sketches an outline only and gives references for further material. This is enough of a lead for research and does not weigh down the reader who seeks to familiarize himself with the problems in the field. Yet, quite obviously, this approach does not have its origin in a reluctance to dig into difficult material. When it comes to research that may lead to clarification of concepts or to discovering trends, the author, on occasion, complains with a strong note of sincerity that technicalities prevent sufficient research. In dealing, for instance,

[1] In the preface, the author attributes this apparent lack of interest to the "unheard of stability of . . . monetary conditions" during the 100 years ending in 1914, which led lawyers "to regard money, not as a problem of paramount importance, but as an established fact." Monetary stability prevailed in England but certainly not in America during that century.

[2] Brooklyn: The Foundation Press 1950. Pp. xxxii, 618. The present reviewer's *Cases in Monetary Law*, Washington, D. C. 1952, pp. iv, 209, was written for classroom use only, and is out of print.

with the body of treaty law that has sprung up since World War II, the author complains (at p. 428) that it has "resulted in so complicated a system that those who have no inside information, but have to rely on their own resources and their own research, find difficulty in understanding its implication and, indeed, in keeping pace with its rapidly changing and progressing evolution."

The first edition of the book consisted of two parts, the first dealing with legal problems of money in general, the second with foreign money obligations. To these, the new edition has added two parts, one on exchange control and valuation of foreign currencies; and a second on the public international law of money.

The first chapter is devoted to the conception of money. The author correctly concludes that the meaning of the term "money" varies, and that it is necessary to examine its meaning in each individual context. He, nevertheless, attempts to formulate a definition. After dealing with money as chattel personal, and creature of the law, the "state theory of money" is contrasted with the "societary theory" (a controversy which is perhaps less important than the noise made about it would indicate).

The second chapter is devoted to the establishment of the unit of account, and the administrative and normative measures (legal tender, convertibility, fiat money) that create a monetary system.

The legal nature of monetary obligations is the next topic. After distinguishing between debts and unliquidated claims, the author deals with "the nominalistic principle [which] means that a monetary obligation involves the payment of so many chattels, being legal tender at the time of payment, as, if added together according to the nominal value indicated thereon, produce a sum equal to the amount of the debt." The wording of the definition itself is not very elegant, but the treatment of this central problem of monetary law is both thorough and lucid. The author traces its history, and discusses its general position in England, its scope, and its application to debts, damages for non-payment, unliquidated damages, rescission, and specific performance. Under the heading "Methods negativing the effects of nominalism," the author gives an excellent review of the various contractual techniques with which creditors tend to stabilize the value of their claims (gold clauses, index clauses, other protective clauses) and deals extensively with their legal effect under different conditions.

The arrangement of the second part of the book, "Foreign Money Obligations," is made clear by the author by a hypothetical case.[3] To the reader to

[3] "Suppose a San Francisco merchant and a Montreal merchant meet in Vancouver, where they enter into a contract under which the Canadian undertakes to pay 100 dollars in London. The subject matter of this obligation being dollars, it first becomes necessary to review the general aspects of a foreign money obligation in English Law. . . . The next step of the inquiry is to ascertain the money which is promised, i.e. whether Canadian or American dollars are the subject matter of the obligation. . . . Thereafter the quantum of the debt, which in case of an intermittent fluctuation of value may be doubtful, must be determined. . . . When

whom the material and jargon of monetary law are new, this gives perhaps a better map of what will follow than the actual chapter headings: Determination of the Money of Account; The Nominalistic Principle, its Scope, Incidents and Effects; The Payment of Foreign Money Obligations; and The Institution of Legal Proceedings and its Effect upon Foreign Money Obligations.

The third part of the book deals with exchange control and the valuation of foreign currencies: After a brief description of the English exchange control before and after enactment of the Articles of Agreement of the International Monetary Fund, it deals with the personal and territorial ambit of the Exchange Control Act and the effect of exchange control on agreements and on transfers of property. In spite of some changes in English foreign exchange law since the publication of the book, the analysis is by no means dated. A chapter on the private international law of exchange control follows (effect of exchange control on validity of contracts, on performance, on property rights), with a separate analysis of the legal situation under the International Monetary Fund Agreement.

The last brief part of the book is devoted to the public international law of money and is a revised version of the author's excellent article, "Money in Public International Law" in the 1949 British Year Book of International Law. It deals with monetary sovereignty, protection of foreign currency systems, and the monetary law of inter-state obligations.

It is quite impossible, of course, to go into the innumerable issues discussed in the book. Most of these are controversial and no two reviewers would probably agree with *all* conclusions of the author; but—and this is what is important—the book gives a fair exposition of the arguments that are rejected, and the references lead the reader to the writers with whom the author disagrees.

2. Schlesinger's *Multiple Exchange Rates* is a study of the role of multiple exchange rates in the economy of underdeveloped countries, the purpose of the book being to point out the benefits that developing countries—particularly in Latin America—can derive from multiple exchange rates. The author discusses the effect of unilaterally imposed multiple rates on imports, domestic prices, government revenues, capital formation and production, export, and foreign investments.

Members of the International Monetary Fund agreed (Act. VIII. Sec. 3) not to maintain multiple currency rates, except during the transitory period (that ended in 1952) without the approval of the Fund. The underlying philosophy was that multiple rates are discriminatory, and lead to the disrupture of international economic co-operation.

---

the extent of the debt is thus ascertained the question arises whether the debtor must tender dollars or pounds in order to discharge his debt at the stipulated place of payment. . . . If he fails to keep his promise and the creditor is driven to institute legal proceedings in this country [England], the last problem arises, to assess the influence of the institution of legal proceedings upon foreign money obligations." (Pp. 140).

When the author emphasizes the advantages of multiple rates on the development of certain countries, he is not necessarily contradicting the soundness of the theory that prompted the enactment of Act. VIII. The question is what is to be achieved. The maximum benefit to one country is not necessarily the optimum if *all* countries are envisaged. It was evidently the point of view of the drafters of the Fund Agreement that if the interests of the community of nations are protected, the individual countries will ultimately take part in the benefit, and that until that time arrives, other means than multiple rates should assist them in their economic development. This, however, does not imply that—as the author concludes—in the competition among nations multiple currency practices are not of great help if only the immediate present is considered by an individual country.

3. *Foreign Exchange in Canada* is a dream come true; it resembles a cookbook on how to cook with eggs and butter after a series of treatises during the lean years on how to prepare food without them. The book was written (as the preface proudly emphasizes) for "the plain banker" and the ordinary man, to explain how foreign exchange operations are again carried out—now that the exchange restrictions are lifted—as they once were in the forgotten days prior to 1939. The book explains in plain language (so that even plain bankers understand it!) how the domestic and international market is organized, the meaning of "spot" and "forward" exchange, how these transactions work out; premium and exchange on U. S. dollar exchange; import and export letters of credit, the Uniform Customs and Practice relating thereto; traveller's letters of credit and traveller's cheques; finally, a brief exposition of the Currency, Mint and Exchange Fund Act (which is reprinted in the Appendix).

4. Rist is one of the most dedicated exponents of the theory that without a "true" gold standard the consolidation of the economy of individual countries and the smooth working of world trade will not be possible. The volume under review is a collection of essays published between 1946 and 1952 and arranged chronologically.

Between the two World Wars the overwhelming majority of theoretical economists rejected the necessity or advisability of having gold as the basis of currencies. In the preface of his *Défense de l'Or* Rist re-emphasizes what he showed in his history of monetary theories,[4] that what seemed "novel" and "modern" in the 1920's and thereafter, was practiced and preached long before the advent of this century, and that we are still fighting a very ancient war.

Rist is convinced that world trade cannot flourish without convertibility, and he cannot conceive convertibility without gold. The many who disagree will perhaps not be converted, but even these will be stimulated by this vivid and lucid little book.

JOSEPH DACH*

---

[4] Reviewed in this Journal, Vol. I (1952) 175.

* Director of the Finance Division, Italian Technical Delegation; lecturer in Monetary Law, George Washington University; member of the D. C. Bar.

MOUCHET, C.—RADAELLI, S. A. *Los Derechos del Escritor y del Artista*. Madrid: Cultura Hispánica, 1953, Pp. 465.

The thesis of the above work on *Rights of the Writer and the Artist* is that, to the real rights, personal rights, and obligations which integrated the classical and once exhaustive tripartite division of Roman private law, there should now be added intellectual rights. Thus, the authors reject the identification of intellectual *rights* as intellectual *property* in the corresponding division of Civil law, a theory prevalent for almost one century beginning shortly after the French Revolution. The authors do not claim complete originality for their thesis, which to some extent follows the one first propounded by Picard in 1873. Among intellectual rights, the Belgian scholar included those in literary and artistic works, inventions, industrial models and drafts, trade marks, and commercial names. The authors reject the last two and, as appears from the title of their work, it is devoted only to rights in literary and artistic works.

The five chapters following the first or introductory one deal with *moral* rights and *pecuniary* rights, a distinction mostly of a scientific and didactic nature, since in reality intellectual rights are not properly thus divided. Moral rights are those of the author to make his works known and to be recognized as their author. *Pecuniary* rights guarantee him economic returns.

Chapter VII deals with the protection of intellectual rights by means of penal sanctions. Of great interest among other things in this chapter is the authors' approach to the main subject from the point of view of national and international morality, and their advocacy of penal sanctions either along with, or in defect of, international treaties.

A separate and interesting chapter, the eighth, is devoted to cinematographic rights, which have been internationally protected since the 1908 Berlin Amendment to the Bern Convention of 1886.

The artistic rights of actors, singers, musicians, etc. in records and motion pictures constitute the subject matter of Chapter IX. The interpreter is not just an instrument through which the author reaches his audience, but a creative artist in his own right. Thus, he also has intellectual rights to be protected.

The following chapter, entitled "Inter-American Protection of Literary and Artistic Works," is almost entirely devoted to the Washington Convention of 1946, its background, including the four different projects presented by the Pan American Union, Argentina, Brasil, Ecuador, and its contents and achievements. One of the most important accomplishments of that Convention was the abandonment of the concept of *intellectual property* and the substitution of *author's rights*.

The last chapter, the eleventh, is entitled, "The Universal Convention for the Protection of Literary and Artistic Works." A good study of the historical developments of both the *European* Bern Convention of 1886 and the *Inter-American* Washington Convention of 1946 culminates in the description of the Universal Convention of Geneva, of 1952. This last Convention was, in turn,

the culmination of the efforts of UNESCO, beginning with the meeting in Paris in 1947 of a Provisional Commission of Experts in Authors' Rights. Meetings followed in Mexico City, 1946; Paris, 1949; Washington, 1950; Paris again in 1951; and finally Geneva, 1952. The Geneva Convention did not purport to substitute for, much less to repeal, the other two mentioned, the European and the Inter-American. Its aims were mostly conciliatory, directed at covering zones not internationally protected. Fundamentally it consists of compromise solutions.

Doctors Mouchet[1] and Radaelli[2] have devoted the last twenty years to an intensive study of intellectual rights, and in that period they have published a large number of articles both in Argentina and in other countries. Their encyclopaedic work in three volumes, *Derechos Intelectuales sobre las Obras Literarias y Artísticas*,[3] acknowledged everywhere as the most complete on the subject ever published in Latin America, is now indispensable for any exacting research project. The book now being reviewed, published five years later, is less encyclopaedic and more a treatise of comparative law. It contains in an excellent orderly form all the information needed by anyone interested in acquiring a good up-to-date knowledge of the subject. Both doctrine and legislation, judicial precedents, Argentinian, foreign, and international, followed by the text of the Geneva Convention, and a rich bibliography are well covered by two outstanding Latin-American scholars.

MANUEL RODRÍGUEZ RAMOS*

---

[1] Professor of Law, University of Buenos Aires. Secretary, Argentine Institute of Intellectual Law.

[2] Professor, Graduate School of Commerce, University of Buenos Aires. Active Member, Argentine Institute of Intellectual Law.

[3] Ed. Kraft, Buenos Aires, 1948.

* Contributing Editor.

Strafgesetzbuch der Russischen Sozialistischen Föderativen Sowjet-Republik vom 22 November 1926 in der am 1. Januar 1952 gültigen Fassung mit Nebengesetzen und Materialien. Übersetzt von Dr. Wilhelm Gallas, Prof. in Tübingen. (Criminal Code of the Russian Socialist Federated Soviet Republic of November 1926 as amended to January 1, 1952 with supplementary legislation and annotations, translated by Dr. Wilhelm Gallas). Sammlung Ausserdeutscher Strafgesetzbücher, No. 60. Berlin: Walter de Gruyter & Co., 1953. Pp. 104.

A particular feature of the Soviet criminal law is that heavy penalties are imposed, not only by the courts, but also by administrative authorities, at the present time by the Ministry of the Interior, the M.V.D., by administrative action. While the courts are supposed to be guided by the Criminal Code and Code of Criminal Procedure, the M.V.D. is not, strictly speaking, bound by any rules of substantive or procedural law. A full picture of Soviet criminal law may be obtained only by an analysis and presentation of material relating to

both aspects of the Soviet penal system. The publication under review is confined to one aspect only—the Criminal Code.

Again there is, strictly speaking, no federal Criminal Code. Until 1922 the courts and administrative authorities were not guided, in imposing penalties, by definite rules embraced in a code. In 1922 a criminal code was enacted for the R.S.F.S.R., the largest of the Soviet states, and was followed by similar codes for the Ukrainian and Byelorussian Soviet Republics. In 1924, general principles of a federal criminal law were enacted, containing only the so-called General Part dealing with general principles of punishment, its application, defenses, *mens rea*, etc., without definitions of specific crimes. In addition, a Statute on Offenses against the State and a Statute on Military Crimes were put into effect by federal legislation. Thus, the codes of the individual republics were revised to fit the federal legislation, and in the R.S.F.S.R. a new Criminal Code was promulgated in 1926 and the Statute on Offenses against the State was inserted after its Sec. 58 as Secs. 58^{1}–58^{14} and 59^{1}–59^{13}. The Statute on Military Crimes was inserted after Sec. 193 as Secs. 193^{1}–193^{21}. The codes to be found in the other fifteen Soviet republics either repeat the R.S.F.S.R. Code word for word or deviate from it only in minor details. Later, criminal legislation was enacted almost exclusively by the federal authorities. In some instances the new federal criminal law instructed the authorities to amend their codes correspondingly, and in others new penalties and new crimes were established not fitting the system of the criminal codes and occasionally leaving in doubt whether new provisions should apply side by side with the codes or repeal their provisions. The instruction to amend the codes sometimes was followed, sometimes it was not. Consequently, even the criminal law as applied by the courts is not confined to the criminal codes which are wrapped in numerous scattered and not co-ordinated laws and decrees.

The translation under review gives due attention to this aspect of the Soviet criminal law. Almost every year the R.S.F.S.R. Criminal Code is printed by the Ministry of Justice with the text brought up to date and annotated by supplementary statutes and leading decisions of the Supreme Court of the U.S.S.R. These decisions are not in the nature of cases giving the facts but represent the instructions given by the Supreme Court to the lower courts on the interpretation of statutory clauses in the administration of justice. The Soviet Supreme Court has the authority to issue such general instructions.

The book under review is an accurate and reliable translation into German of such an edition giving the state of legislation as of January 1, 1952. The preface, additions, and annotations by the translator do not go beyond presenting some Soviet material of the same type. There is no analysis, no critical evaluation of Soviet law, nor a complete picture of Soviet criminal law since the provisions of the procedural code, judiciary act, and regulations regarding the M.V.D. are not reflected in the publication.

This is the second translation of this type, the first having appeared in 1931,

but that edition did not contain any supplementary legislation or annotations. The limited scope of the publication is probably explained by the fact that it appeared in an otherwise excellent series of translations into German of criminal codes of numerous countries and follows the general pattern of the series: *Sammlung ausserdeutscher Strafgesetze*. However, for codes of non-Soviet countries a mere translation is all that is needed, while the Soviet code needs more analytical and critical comments.

With its limited contents the publication serves a very limited purpose of offering a German translation of one of the sources of Soviet criminal law. Therefore, it is essentially a reference book. It is not a study but merely material for study. In view of many departures of Soviet law from basic principles of administration of justice followed both in countries of common law and in those of civil law, an uninitiated student may easily be misled by the perusal of such type of publication.

VLADIMIR GSOVSKI*

* Chief, Foreign Law Section, Law Library, Library of Congress.

Lectures on Federal Antitrust Laws. Delivered at University of Michigan Law School, June 17–June 19, 1953. Foreword by S. Chesterfield Oppenheim. Ann Arbor: University of Michigan Law School, 1953. Pp. xiii, 321.

This volume incorporates twenty-three lectures on current problems of business and and antitrust legislation delivered at the fifth Summer Institute of the University of Michigan Law School by a panel of outstanding experts from law schools, federal offices, and the bar. Some of the papers contain revaluations of recent court decisions concerning specific antitrust issues; some are designed to serve as legislative proposals. A few contributions—perhaps the most impressive ones for the foreign reader—restate basic American economic philosophies with a view to future developments of law and business. It would be unjustified to lay special stress upon one or another paper because all parts of the book reflect intensive research work and able efforts to interpret and possibly improve the Federal antitrust system. In their compilation, the lectures are a meritorious example of the truth that the understanding of the steady growth of a jurisdiction is a presupposition of adequate application of statutory law.

Since the growth of the body of law usually characterized as "United States Antitrust Law," was and still is linked with the changing relations between American government and business, this antitrust institute was organized as a step in the "constant reassessment of the relations between government and business under an antitrust policy avowedly designed to benefit the consuming public."[1] Judged from this point of view, the papers leave the definite impression that, to the citizen of the United States, antitrust legislation means the

[1] Oppenheim, Introduction, p. xiii.

legal outgrowth of the fundamental philosophy that it is everybody's public right to pursue his happiness, "to grow and to earn rewards;"[2] and that, therefore, law must provide for rules that "forbid things which common sense can identify as being monopolistic or conspiratorial abuse of the public interest."[3] This basic philosophy being generally accepted, diversity of opinions only affects the means of how happiness may be pursued and how the right to do so may be secured.

This is remarkable because, in contrast to America's firmness of philosophy thus confessed, some European countries hesitate to find a similar antitrust philosophy the best way to settle the conflicts between the individual's economic rights and the public interest. When France received her "Sherman Act" last fall[4]—*pour maintenir la libre concurrence*—critics deplored that "again a part of private, *i.e.*, civil or corporate, law has been made 'public law' and hereby a certain context of contractual relations has succumbed to government control".[5] In Germany, the old debate whether the constitution provides for a competitive market system that necessitates an antitrust policy analogous to that of the United States, reached a new springtide when Prof. Nipperdey (University of Cologne) published his recent article under the title: "The Social System of Competition in the Constitution of the Federal Republic" (*"Die soziale Marktwirtschaft in der Verfassung der Bundesrepublik"*).[6] In general, Germans are slow in recognizing a specific market system as being constitutionally guaranteed or postulated.[7] In Ireland, however, according to a law recently enacted, antitrust policy resembles that followed in the United States.[8]

Relations between government and business form the general *background* for a series of antitrust problems discussed in the lectures contained in the book here reviewed. The chapters of the volume, usually embracing several lectures, deal with the monopoly concept under the Sherman Act, patents in connection with the antitrust laws, pricing and distribution problems, business abroad, proposals for expanded application of the rule of reason, and selected practical antitrust problems in court procedures. It is impossible to discuss all problems raised with adequate thoroughness in the confines of this review. But because of their comparative aspects, two points may be taken out of the abundance of instructive material for closer contemplation, the problem of "fair trade" and the concept of "monopoly."

The paper by Mr. Rahl, "Fair Trade Since the McGuire Amendment," gives a good survey of the development of the fair-trade movement in the

[2] Blackwell Smith, p. 321.

[3] Blackwell Smith, *ibid.*

[4] Ordonnance No. 53—704 of August 9, 1953, amending Ord. No. 45—1483.

[5] Gravenstein, "Maßnahmen der französischen Regierung gegen Wettbewerbsbeschränkungen," Wirtschaft und Wettbewerb (1953) 616.

[6] Wirtschaft und Wettbewerb (1954) 211.

[7] *Cf.*, Huber, Wirtschaftsverwaltungsrecht, Band 1, 23 *et seq.*

[8] Wirtschaft und Wettbewerb (1953) 358 and (1954) 353.

United States, its legal consequences and its still unsettled issues. As it is now, the provisions of the state fair-trade acts, including the "non-signers clause," are recognized under federal law as valid statutory rules upon which vertical minimum or stipulated price-fixing agreements may lawfully be based if trademarked commodities are involved. Other countries take different standpoints. In Austria, for instance, resale-price-maintenance agreements are summarized under the "cartel" concept and have to be reported by the parties to the agreement to the cartel authority (*Kartellkommission*) for approval.[9] In Sweden, resale-price-maintenance contracts are among the few generally prohibited cartel practices.[10] In Germany, under the Western Allied occupation laws, such agreements are at present permitted if related to trademarked articles (*Markenartikel*).[11] There is some dispute whether the future German Law against Trade Restraints (*Gesetz gegen Wettbewerbsbeschränkungen*) should exempt trademarked articles and books from the general prohibition of vertical price-fixing agreements otherwise provided.[12]

Whereas the United States, thus, in the fair-trade field show a rather extreme position in comparison with other countries, the American approach to the monopoly concept has its similar foreign counterparts. Several papers of the volume, in particular those by Messrs. Brown, Carlston, and Wood, attempt to clarify the characteristics of illegal monopoly in the light of recent court decisions. The general conclusion that might be drawn from those lectures is that, in the United States, all agree upon the bad effects that are involved in market monopolization, but that there is constant fluctuation of the tests through which monopolization can be measured and defined. Corresponding consent as to the undesirability of monopoly as such, and disagreement as to the methods of defining and preventing monopolies, may be found in Great Britain where the "denationalization" program of the Conservative government stirs up many questions of concern.[13] The same is true for German plans to check misuse of industrial bigness and monopolization through integration that are subject to discussions preparatory to the enactment of the beforementioned Law against Trade Restraints.[14] New problems of monopoly are presented by the European Coal and Steel Pool covering Belgium, France, Italy, Luxemburg, The Netherlands, and West Germany.[15] In every case, monopoly as such is condemned,

[9] Österr. Kartellgesetz, of July 4, 1951 (Ö. BGBl. S. 653), §§ 1, 12. Wirtschaft und Wettbewerb (1953) 440.

[10] Neumeyer, "Das Schwedische Kartellgesetz und sein Hintergrund," Wirtschaft und Wettbewerb (1953) 612.

[11] LG Berlin, of June 13, 1953, WuW (1953) 633 = NJW (1953) 1472.

[12] Dörinkel, "Die Bindung von Preisen und Geschäftsbedingungen bei Markenwaren," WuW (1953) 663.

[13] Haering, "Zur Entwicklung der Monopolkontrolle in Großbritannien," WuW (1953) 87. Gleiß, Kartelle und Monopole, Heidelberg 1952.

[14] Huber, Wirtschaftsverwaltungsrecht, Band 1, 409.

[15] Krawielicki, Das Monopolverbot im Schumanplan, Tübingen 1952.

but opinions differ on the degree to which monopoly is—perhaps politically—*inevitable*,[16] and to what extent effective measures against monopoly can therefore be applied.

This volume of antitrust lectures is certainly a stimulating book. Jurists and businessmen—not only in the United States—should lend their attention to the questions of economics, law, and philosophy, asked and answered in these lectures. They are testimony to the efforts made in a highly industrialized country to achieve a well-balanced law of economic relations. Reversely, they may serve as a key to the understanding of one of the most fascinating and intriguing subjects in modern world economics: American business.

WOLFGANG FIKENTSCHER*

[16] *Cf.*, U. S. v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. C. Mass. 1953).

* Dr iur., LL.M., Research Assistant, University of Munich, Faculty of Law.

Labor Relations and the Law. Compiled by a group of Teachers and Practitioners of Labor Law. Robert E. Mathews, Editor in charge. Boston: Little, Brown and Company, 1953. Pp. xlviii, 1100.

A distinguished group of teachers and practitioners in labor law[1] conceived this work, now published in its third edition, with the object of making a special contribution for the United States of America, which the authors consider necessary even today for the adequate training of law students in this field. The editor in charge representing the editorial group says: "These contributions, we feel, are of four types: (1) a new approach ot the process of compiling a casebook; (2) a major shift in emphasis; (3) an expansion in the use of problems as teaching devices; and (4) the introduction of materials from foreign countries as a basis for comparative study."

The work is divided into five parts and an appendix which encompass 1100 pages carefully written, printed, and bound. With an original, gradual, and

[1] Benjamin Aaron, Institute of Industrial Relations, University of California at Los Angeles; James E. Brenner, Stanford University; Abner Brodie, University of Wisconsin; Jack G. Day, Attorney, Cleveland; Nathan P. Feisinger, University of Wisconsin; Paul Fisher, Labor Economist, Mutual Security Agency; Alexander H. Frey, University of Pennsylvania; Ralph H. Fuchs, Indiana University; Carl H. Fulda, Rutgers University; Sylvester Garrett, Chairman, Board of Arbitration, Pittsburgh; Robert L. Howard, University of Missouri; Arthur Lenhoff, University of Buffalo; Irving J. Levy, Attorney, Washington, D. C. (deceased); W. Howard Mann, Indiana University; Robert E. Mathews, Ohio State University; Charles A. Reynard, Louisiana State University; David E. Rice, Texas Southern University; William G. Rice, Jr., University of Wisconsin; Stefan A. Riesenfeld, University of California; Paul H. Sanders, Vanderbilt University; Geoffrey Sawyer, Australian National University; Oliver Schroeder, Jr., Western Reserve University; William C. Soule, Wake Forest University; Richard S. Sullivan, Boston College; Clyde W. Summers, University of Buffalo; Edwin R. Teple, Attorney, Federal Security Agency, Cleveland; M. T. Van Hecke, University of North Carolina; Bertram F. Willcox, Cornell University; Jerre S. Williams, University of Texas; W. Willard Wirtz, Northwestern University; Donald H. Wollett, University of Washington.

logical system of exposition and compilation, the following topics unfold with propriety and profound mastery: Part 1, Organized Labor in a Free Enterprise Society; Part 2, Establishment of Collective Bargaining; Part 3, Collective Bargaining; Part 4, Legal Limitation on Economic Pressure; Part 5, Unions and their Members.

Generally speaking, we may set off two different fields of study which are nevertheless intimately correlated: the doctrinal, philosophical, and sociological field on the one side and the practical, statutory, and comparative field on the other. In the first line of inquiry, Alexander Hamilton Frey[2], Henry C. Simons[3] and E. Wight Bakke[4] give us, in clear concepts the ideal substance or essence which gives life to the entire juristic Anglo-American labor system and its sociological structure. In the second approach, it reflects the American national experience in a comparison with the European systems, stressing the contrast between two diverse labor and union philosophies, which are nevertheless bent on achieving the same goal by different means. In the Anglo-American system, the main source of labor regulations is collective bargaining and agreement, and secondarily statutory and case law. That is why the legislative aim focuses more on equalizing the bargaining power of both sides of the contractual relation than on direct protective regulation. The European system on the contrary, lays stress on state action, on the government power, and regulates by law in detail almost all the terms of the employer-employee relationship. The former system tends to decentralize state power while accomplishing that process of vertical and horizontal pluralization of the forms of sociability in democratic states; the latter, through a reverse path, accomplishes an integrative process typical of socialistic nuclei.

"In conclusion,"—say the editors (pag. 89)—"one must admit that the differences in structure and characteristics between American and Continental labor laws are significant, but it is perhaps proper to warn against exaggerations on this score. It is true that abroad legislation rather than contracts controls the specific content of employment relations. However, it is the power of labor organizations which influences the direction of that legislation. Since the end of the war, the employment of organizational force is in France, Italy, and in all German Länder guaranteed in the constitutions. Unionism represented in collective contracts and, more or less in control over the works councils in all the larger enterprises, also shows its power through legislation which extends collective contract terms to other than to contracting parties and their members. At the same time, the unions in America, through the National Labor Relations Board and the courts, have greatly widened the subjects which reach from simple wage rates to work loads, technological changes, work standards, and pension system. This, though contractual in form, is in substance legislation. Thus, in spite of important distinctions, there is more than one bridge between the two powerful streams of foreign and American Labor Law."

In reality, the American system has decidedly abandoned the doctrine of nonintervention in labor matters, and in substance the bargaining table and the

---

[2] III. "Democracy, Free Enterprise, and Collective Bargaining."
[3] IV. "Some Reflections on Syndicalism."
[4] V. "Why Workers Join Unions."

legislatures are the most important sources of the new labor law. In this it resembles the European system, which in essence is the same as the Latin-American system. But the most conspicuous and even paradoxical contrast is the following: the Anglo-American system, having started from an individualistic principle reaches an integrative-union postulate: that the collective agreement cannot be modified individually, not even if benefiting the workingman; and the European system, starting from a concept of social integration reaches the individualistic principle of possibility of individual modification of the collective agreement when in this way the interested workingman is benefited.

The Anglo-American liberalism turns social and European socialism dilutes its original totalitarian absorption looking for a middleground of equilibrium between the individual and society or the state. At any rate, the recognition of the legitimacy of labor unions as autonomous and free institutions, and as sources of norm-making, is more a predicate of individualism than of socialism. Precisely, in postulating a policy of abstention, or of minimum state intrusion in the problems of economic relations, liberalism had to acknowledge the right and the individual liberty of assuming the defense and protection of interests and of self-regulation in internal affairs through concerted action in collective agreements and to settle differences through conciliation and arbitration. In this way, liberalism recognized a sphere of juristic competence and action distinct from state action from which the legal recognition of professional associations and of the right of association as consequents or concomitants to individual rights and freedoms resulted.

It is clear that the first individualistic postulate,—that between the individual will rooted in man and the collective will rooted in the nation or state no intermediate will could exist which might arrogate the representation or exercise of the former, or coparticipate in the sovereignty or legislative monopoly of the latter,—had to undergo revision. Exactly, from the point of departure of liberalism, rechannelled later through the path of a social reality which the pressure of history imposed on it, was reached the recognition of a right which starting from a totalitarian or socialistic conception would have been denied. The interventionism of a socialistic state rejects, on principle, the competence of professional or unionistic interventionism. If we have witnessed or still witness unionistic structures in some of the integrative states, they have been and are nominal organizations, subservient juristic and political molds where the right of professional association as an individual faculty and freedom of the working masses does not exist.

This book represents a valuable contribution to the specialized national bibliography. Although the authors characterize their work as one aimed at the needs of law students, the acquisition and perusal of this book is a rewarding experience for scholars and practitioners in labor law; above all for those who wish to broaden their scientific juristic vision with a good start in the comparative field. A pure scientific fervor animates the authors, a fervor demonstrated

in this brilliant and carefully conceived and realized work, and by the absence of any aim at economic speculation in its publication.

PABLO S. SINGER*

* Doctor in Law and Social Science, University of Córdoba, Argentina.

SCHWARTZ, B. *French Administrative Law and the Common-Law World.* New York: New York University Press, 1954. Pp. xxii, 345.

As pointed out in the Introduction by Chief Justice Arthur T. Vanderbilt, of the Supreme Court of New Jersey, administrative law involves much more than administrative procedure; at the heart of administrative law lie some of the most vexing issues of modern government, having to do with the distribution of powers of government as between governmental branches and units, and the effect thereof on the freedom of the individual and on the strength and stability of the State. The attorney concerned with these deeper implications of the subject will be interested in Professor Schwartz' comparative analysis. His book discusses the functions of administrative agencies and the administrative courts in France, largely in light of the comparison between the Continental system and that of the common law.

The essential difference between the French system and that of the United States is that in the Anglo-American system the rules of administrative law have been formulated by the same courts that adjudicate ordinary private law questions, while in France the control of the legality of administrative action is vested in a separate order of administrative courts, principally the *Conseil d'État*. In both systems, however, there exists the basic principle that one adversely affected by improper administrative action may have such action reviewed and set aside by a court wholly independent of the administrative agency. The administrative courts in France, Professor Schwartz emphasizes, are completely independent of the active administration. In some ways, their functions are comparable to those envisaged in the proposals for administrative courts which have been suggested in the United States; the author suggests that an examination of the workings of the French administrative courts should effectively facilitate an appraisal of the desirability of creating separate administrative courts in this country. His conclusion in this respect is that it does not seem desirable to establish a system of separate administrative courts in the Anglo-American world, both because it violates the basic principle of unification of remedial justice that has dominated our legal system and because it invites the dangers inherent in overspecialization by the judiciary.

The trend in judicial review has been different in France than in this country. There, the *Conseil d'État* has been consistently expanding the scope of reviewing power, and there is a possibility that the French administrative courts may in the not too distant future exercise a full power of inquiry over both the law and the facts in every case. The French development in this respect, says the author, should provide substantial support for whose who feel that judicial

review can be broadened in our system without impairing the efficiency of administrative action.

Professor Schwartz points out various aspects of the French system that appear to him to be in advance of Anglo-American administrative law, including simplicity in procedures for appeals to the courts, and reduction of the costs of litigation.

FRANK E. COOPER*

* Member of the Michigan Bar.

VIEHWEG, T. *Topik und Jurisprudenz.* München: Verlag C. H. Beck, 1953. Pp. 75.

During the 19th and a considerable part of the 20th centuries, Civil Law jurisprudence, especially in Germany and Italy, was inspired by the idea that the totality of a legal order could be conceived as a logically closed and consistent system. In such a system, every case could be subsumed under a given legal proposition, all of which could in turn be derived, through successive steps of logical implication, from a few, or perhaps even one, supreme principle. It was regarded as the supreme task of "legal science" to discover and formulate this system, and to develop the method by which it could be used for the decision of every conceivable problem. Clearly, such a system could never be found, and the practice of the courts, attorneys, and legislators could not take too seriously that predominance which was claimed for it by some, although never by all, of the scholars. Nevertheless, the widespread belief that the science of law had as its task the development of the system and the derivation from it of rules of law directly applicable to every conceivable problem was an important element in the development of that peculiar method of legal thought which has come to be known as conceptual jurisprudence and which, in its impressive consistency, spread to, and achieved a not inconsiderable influence in, the countries of the common law. Not only in America, but also in the countries of its origin, conceptual jurisprudence has come under attack. In Germany, it has, indeed, ceased to be dominant. What seems to take its place, both here and in Europe, is that kind of legal thinking which is known as the functional approach, sociological jurisprudence, or jurisprudence of interests.

In the little book here under review, Doctor Viehweg, editor of the *Archiv für Rechts- und Sozialphilosophie*, contrasts the method of "axiomatic," i.e. systematizing jurisprudence, with another which he calls the "topical," and which he finds to have been the method both of the Roman jurisconsults of antiquity and of the Bartolists who sought to adapt the rediscovered Roman texts to the practical needs of the later Middle Ages. The name of the method is derived from Aristotle's Topics, in which it is analyzed as a tool of dialectical discussion. Its entrance into the law is found in the close connection which is said to have existed in ancient Rome between the jurists and the orators. In

its application to law, especially in later European practice, the topical method consisted in the formulation of certain maxims of broad significance, the totality of which had in no way to form a coherent logical system, but which rather contradicted each other often enough.

Which one of these manifold applicable maxims should be regarded as pointing out the solution of a concrete problem would be determined by the jurist not in the process of the syllogism but by that sure touch which develops from the jurist's being steeped in a fixed tradition and a definite style. The author's illustrations are taken from continental law. Fitting examples might also be found, however, in Anglo-American law, to which the "topical method" had spread especially through the habit of 18th century judges and chancellors to quote a good many of those *regulae iuris* which are listed in the 50th Book of the Digest, and which, as *maxims of equity*, have helped many a chancellor to find, or at least to justify, his decisions.

Doctor Viehweg's historical survey is of considerable interest for the scholar of comparative law, especially when it is read in connection with Max Weber's sociological comparison of methods of legal thought.[1] Of great value to the method of comparative law is also the author's emphasis upon the necessity in legal thought to start from the problem rather than from the rule of law. Only by comparing solutions of a common problem, and of the mental ways in which the solution is found, is it possible to develop a "functional" method of comparative law. We must be sceptical, however, as to the usefulness of the topical method in contemporary legal thought. Systematic conceptualism pretended to decide practical cases by the alleged application of purely deductive logic. In fact, this apparently deductive cognition frequently served to hide volitional decisions of the legislator, the judge, or both. By thus hiding the volitional policy decisions, the method tended to render them both inconsistent and uncontrollable. The same effect is achieved by the topical method, except that its non-systematic character is openly confessed. What jurisprudence has been working for in our days is a method which makes apparent to the lawmaker in the legislature and on the bench, as well as to the citizen, the policy considerations on which the decision is, or ought to be, based. No method hiding the policies of decision will be acceptable in the age of democracy, psychoanalysis, and political science.

MAX RHEINSTEIN*

---

[1] Law in Economy and Society (1954), esp. chapters 7–11.

* Board of editors.

JACKSON, R. M. *The Machinery of Justice in England*. 2nd ed. Cambridge: at the University Press, 1953. Pp. ix, 372.

This is the second edition, partly rewritten and in various respects improved, of the outstanding work on the administration of justice in England. Since the first edition appeared in 1939, as the preface discloses, observation at close

range of many institutions has led the author to believe that development along existing lines is more likely to succeed than radical institutional innovations. In fact, the scene has changed: since then, substantial reforms have been effected in criminal and civil justice, in the organization of inferior tribunals, in the provision for legal advice and assistance. Hence, as the author candidly notes, this book is now not only brought up to date but also changed in temper, reflecting the significant shift in the mental climate of England today from complacency to willingness to examine and, where needs be, to reform legal institutions.

From a comparative viewpoint, and especially in relation to the administration of justice in the United States, this work is of unusual interest. Readable, trenchant, and witty, it gives a clear and eminently practical conspectus of the organization and operation of civil and criminal justice in England, of the personnel of the law, of the costs of litigation and the proposed scheme of legal aid, of the special—or as we should say administrative—tribunals and their supervision by the courts, and the specific needs of reform. The author's emphasis upon procedure, upon the actual functioning of the English system of justice, is refreshing and illuminating. A few illustrations must suffice. Noting that differences such as in language, or the authority of judicial precedents, or the prevalence of jury trial, or the "rule of law," do not afford an adequate explanation of the distinction between common law and "Romanesque" legal systems, the author suggests that the key is to be found in the respective position and training of the judge in the two systems. Likewise, the concise analysis of English trial procedure in terms of accusatorial and inquisitorial modes of trial, or more particularly of the "contest" and inquisitorial theories, depending on whether the parties or the judge manage the proceedings; the poignant account of the practical difficulties still extant in England in fixing the dates for trial of civil cases; the problems presented by the reform of so-called Matrimonial Proceedings; the contrast between the meticulous conduct of criminal trials and the hasty technique of sentencing, a topic on which the suggestions of the author are especially instructive, as well as the system of prosecution itself, basically private but effectively controlled by a Director of Public Prosecutions, who actually prosecutes only a fraction of the criminal cases; not to mention the many questions connected with the recruitment of the legal profession, costs, and legal aid, and the valuable survey of administrative tribunals, suggesting the basic distinction to be drawn between "ministers' powers" and "special tribunals"—these may be mentioned as facets exemplifying the general significance of the English system of justice as assessed in this work.

H.E.Y.

Book Notices

KOTZÉ, P. J. *Die Aanspreeklikheid van Mededaders en Afsonderlike Daders.* (with a Summary in English). Leiden: "Luctor et Emergo," 1953. Pp. x, 156.

This monograph on the liability of "Wrongdoers Joint and Several" is a worthy counterpart of Professor Williams' "Joint Torts and Contributory Negligence" (London, 1951) and Professor Gregory's "Legislative Loss Distribution in Negligence Actions" (Chicago, 1936), adding to these classics a welcome historical and comparative analysis. In Chapter I (pp. 1–31) we are introduced to the Roman law of the *actio legis Aquiliae* and *actio iniuriarum* and in Chapter II (pp. 32–50) to the medieval pandectist development of these actions. Chapter III (pp. 51–81) gives us a new insight into the Roman-Dutch doctrine of Van der Linden and the Voets. In Chapter IV (pp. 82–112) we find a condensed and helpful survey of modern French (82), Dutch (84), and German (p. 86) law as well as a careful and elaborate discussion of English case and statutory law (pp. 89–112). It is the final fifth Chapter (pp. 113–139), however, which will be of the greatest interest to the comparatist and the student of modern developments in the law of torts. Here we meet the South-African lawyer's complaint, so pertinent in this country today, about the all-or-nothing principle still prevailing in the relations between several tortfeasors as well as between the tortfeasor and his victim (pp. 135–139). A reservation may be in order concerning the remedy recommended by the author. Adoption of Voet's stress on blame as the basis of an apportionment of damages would no doubt mean progress with regard to a liability based on moral fault, but would entirely fail in what this reviewer has termed enterprise liability for "negligence without fault." Yet it is this kind of liability which in the Union of South Africa, too, constitutes by far the greatest number of tort cases in the courts—if we may judge from the South-African case law so painstakingly and lucidly discussed by the author.

A. A. E.

FLORY, M. *Le statut international des gouvernements réfugiés et le cas de la France Libre 1939–1945.* With a foreword by R. Cassin. Paris: Éditions A. Pedone, 1952. Pp. xi, 304.

The present book gives a survey of the history of the governments-in-exile established in London during World War II, of the basis for their existence under international law and under the constitutional law of the countries concerned, as well as of their internal and international activities. The author discusses at length the legislative, executive, and judicial activity of these governments, especially in relation to the host country. According to the author, these governments had the right to enact legislation binding not only their nationals residing in the host country but also those who had remained in the occupied territories. The author shows the difference between the British and United States attitude towards allied forces stationed in their country. Whereas the United Kingdom, according to its own traditions, proposed to grant members of these forces immunity only in respect of official acts, the United States insisted that their troops stationed in the United Kingdom should be wholly immune from British jurisdiction.

Among the international activities of governments, the author stresses their right to act on behalf of their states and their right to recognition also by neutral third states. He then tries to justify decisions like *Anderson*

v. Transandine, upholding the rights of such governments to freeze or to requisition assets which their nationals hold abroad. According to the author, these decisions are to be explained only by the fact that reasons of inter-allied public policy advocated such a course. The author does reject the view that, for the recognition of the extraterritorial effect of these decrees, it was sufficient that they were of a nonconfiscatory character. Reasons of inter-allied public policy fail however to explain the similar Swedish decision in the *Rigmor* case and decisions of Austrian, British, and Canadian courts which were ready to grant extraterritorial effect to nonconfiscatory expropriation decrees of foreign governments enacted after the end of World War II.

The author shows how the continuation of the recognition of the Vichy Government and a certain hostility to General de Gaulle on the part of the United States rendered the task of the Free French more difficult than that of the other governments-in-exile. The closing chapter of the book is devoted to the abandonment of some governments-in-exile, especially the Polish, by their former allies.

IGNAZ SEIDL-HOHENVELDERN

VON BERGEN, W. *Der Einfluss der Lateranverträge auf die staatliche Gesetzgebung Italiens*. (The Influence of the Lateran Treaties upon the Legal System of Italy). Düsseldorf: Verlag Triltsch, 1954. Pp. 150.

On the 11th of February, 1929, Benito Mussolini, as representative of Italy, and Cardinal Gasparri, Secretary of State of the Holy See, in the Lateran Palace in Rome placed their signatures under those three treaties which put an end to the "cold war" which had existed between the Holy See and the Kingdom of Italy ever since Italian troops had occupied Rome on September 20, 1870, and thus destroyed the temporal rule of the Pope in the Papal States. By these Lateran Treaties papal sovereignty was restored, although only over the minuscule State of the Vatican City, the financial relations between Italy and the Holy See were placed upon a new basis, and, by a concordat, the legal status of the Roman Catholic Church was secured as that of the established church in Italy. The treaties, which have been recognized as binding upon it by the Italian Republic, have now been in effect for a quarter century. Their effects within that period upon the legal life of Italy are described in the German language by a young legal scholar, whose father was German ambassador to the Vatican for twenty-four years, and who holds degrees in law in both Italy and Germany.

The major part of Doctor von Bergen's book is devoted to the description and analysis of the situation which has been created in Italian law by that provision of the Concordat (Article 34) in which the Italian State "recognizes as effective for purposes of the civil law the sacrament of marriage as regulated by Canon Law." By agreeing to this provision, the Italian state reversed its former policy of claiming the institution of marriage as the exclusive province of secular power and restored to the Church the power to regulate the law of marriage by its own Canon Law. The liberal traditions for which Italy had fought in the period of her resurgence (*Risorgimento*) were, it is true, not entirely abandoned. Under the legislation which was enacted to implement the Concordat and to transpose its provisions into the secular legal order of Italy, it is still possible to conclude a marriage before a secular officer of civil status or before the minister of some recognized religious community other than the Roman Catholic Church. By relaxing the former requirement of a civil ceremony for all marriages, and by rendering it permissible for the parties to a marriage to have the

ceremony performed before the minister of the Church or some other religious denomination, the Italian legislation of 1929 seems to have done no more than establish that state of affairs which we find in every state of the United States (except Maryland, where no civil ceremony of marriage is available). However, the Italian law is different in a matter of significance: for all controversies concerning the validity or the annulment of a marriage concluded before a Roman Catholic priest, jurisdiction has been handed over by the state to the courts of the Church, which have thus been restored as the matrimonial causes courts in the overwhelming majority of Italian cases. This abdication of the state from its exercise of jurisdiction in a matter of fundamental significance constitutes the most striking legal feature of the arrangement under the Lateran treaty. Against this far-reaching revision of the boundaries between the spheres of ecclesiastic and secular power, it is only of technical importance that elaborate rules were enacted to guarantee smooth co-operation between the two powers and strict observation of the border as established by the treaties. These elaborate rules of Italian legislation are ably presented and discussed in the present book, which also contains a brief discussion of the legal and political background of the Lateran treaties as well as of their provisions concerning the establishment of the State of the Vatican City, the position of the Roman Catholic Church in Italy, and the consequences which follow for the status of non-Catholic religious communities. The discussion of the latter will be helpful for the understanding of those conflicts between the Italian government and certain Protestant sects about which reports, occasionally of a sensational character, could be found in recent years in the American press.

M. Rh.

WYPYSKI, E. M. *The Law of Inheritance in all Forty-Eight States*. Legal Almanac Series No. 33. New York: Oceana Publications, 1953. Pp. 96.

This is a clear and concise exposition of the existing law of inheritance in the forty-eight American states. Apart from serving admirably as a source of information, this small book presents a topic of the greatest interest for comparative consideration. On the one hand, it exemplifies what an elementary but effective exposition of the positive law in any country could be. On the other hand, the diversity in the legislation of the states in the Union at the same time renders the book a model of complete and systematic, if elementary, exposition of a multiplicity of laws.

Precisely in this subject matter, American law offers an interesting combination of civil law and common law. Spanish and French influences have contributed to the formation of the American law of inheritance to a greater degree than is to be observed in other branches of law. The influence of Roman and Canon law was traditional in the field of personal property, but the prevailing tendency in the modern legislation exhibits an undeniable trend to unify the legal treatment of both forms of property, real and personal. This phenomenon is of extraordinary interest for comparative law, since it affords a demonstration that, despite all the differences, frequently quite immaterial, among the laws of the forty-eight states, the law of the United States of America constitutes an example of a most thoroughgoing unification of the civil law and the common law.

The characteristic diversity and even casuistry in the laws are most clearly displayed, especially in a number of tables of the principal legislative variations respecting the following topics: right of dower, curtesy and statutory substitutions; homestead regulations; spouse's right of election; inheritance by and from

illegitimate children; and the degrees of relationship under the civil law. There are also summaries of the state laws in the third chapter (rights of surviving spouse) and the eighth (aliens). A table of statutory references, an alphabetical index, and a selected bibliography complete the work.

JOSÉ PUIG BRUTAU

RADBRUCH, G. *Elegantiae Juris Criminalis. Vierzehn Studien zur Geschichte des Strafrechts*. (2nd enlarged edition). Basel: Verlag für Recht und Gesellschaft A. G., 1950. Pp. x, 232.

This is the last work which this outstanding legal philosopher prepared before his death on November 23, 1949. The first edition (1938) contained only seven of the fourteen essays included in the second (1–3, 8, 9, 11, and 14). Two of the other seven (7 and 12) appear for the first time, while five others have appeared elsewhere.

To say that a particular work of a man with the career of Gustav Radbruch, produced in the mature years of scholarship, is of greater significance than any other work of his, is of course, impossible. One can say of this last volume, however, that it stands in a more intimate relationship to the author than any other of his contributions to jurisprudence.

Radbruch's *Grundzüge des Rechtsphilosophie* appeared in 1914 (reprinted in 1922). A revised edition of the *Grundzüge* was published in 1932 as *Rechtsphilosophie*. With this work, Radbruch had quite early in his professorial life laid the foundations of his academic achievement; with other related studies, it marks the most important channel of his scholarship. But in addition Radbruch used another approach, less formal, but broader in scope, which belongs to his later days. In the introduction to the first edition the author explained that: "... the title *Elegantiae Juris Criminalis* denotes the joyous historical curiosity, which gave the impetus to these labors. ..."

This was a result of many factors—of awareness of the cultural significance of legal phenomena, of the search for the human being under the formula of law, and of the broad classical background of the author. In his younger days Radbruch was a socialist. Later he rejected the materialistic interpretation of history and parted ways with the Marxian trend of socialism. However, one thing from his socialist days remained with him until the end and in a sense provided the main theme of the *Elegantiae*, as expressed in the title of the first study of the collection: "*Der Ursprung des Strafrechts aus dem Stande der Unfreien.*"

As we observe the course of Radbruch's thought in legal aspects of cultural history, as portrayed in the *Elegantiae*, the extremely broad scope of his interests becomes apparent. He moves from one vantage point to another to observe the legal scene from an ever different angle, always concerned with the nature of the criminal act, retribution, and justice, endeavoring to bring to light those various cultural forces which contributed to the formation and formulation of legal concepts. The status of the "unfree," planetary criminal anthropology, Hans Baldung's pictorial studies of witches, ideas of poets, jurists, and studies of contributions of great men in the field of jurisprudence to the treasure of legal ideas, all serve the same purpose. The fifth essay, "*Lieb der Gerechtigkeit und Gemeiner Nutz, eine Formel von Johan Schwarzenberg*," reflects the evolution of the author's views since he modified his theory of relativism by the postulate of justice as the ultimate criterion of the rightness of positive law.

The first edition of the *Elegantiae* was dedicated to Radbruch's two children. In 1938, when the first edition appeared, Radbruch was sixty, and having been removed from his teaching post in 1933 by the Nazis, was academically inactive. The language of the foreword to the 1938 *Elegantiae*

makes it plain that he viewed it as the end of his career. The 1950 *Elegantiae* appeared after his return to teaching, to active participation in academic life, but after the loss of his children. This time the end of a full life was at hand.

K. GRZYBOWSKI

Das Indische (Pakistanische) Strafgesetzbuch. Translated by Professor Georg Dahm, with an introduction by the translator. Berlin: Walter de Gruyter & Co., 1954. Pp. viii, 139.

The translation (from English) is an important addition to the collection of penal legislation, though for obvious reasons, of lesser usefulness for the scholars of this country. The Indian Penal Code, enacted in 1860, is still in force in India and Pakistan, and constitutes a basic piece of legislation for over 300 million inhabitants of the Indian subcontinent.

The Code is one of those enactments of British conception which made modern India and Pakistan possible, just as the gradual extension of British power over British India and the Indian princes paved the way for the emergence of modern India and Pakistan.

Partial reforms of the penal law in India were made even prior to the transfer of government from the East India Company to the British Crown in 1858. Until the enactment of the Code, the penal law of India consisted of the Mohammedan law introduced and enforced under the reign of the Moguls, with the Koran as its principal source. The Code which replaced the Mohammedan law was a result of a prolonged legislative process. The first draft was prepared in 1838. However, the Company was reluctant to disturb local custom and law and delayed enactment until its demise. In 1860, the law was enacted, and in 1862 it went into force.

The Code represents only a part of the substantive law in existence in India. Certain provisions, which in countries with codified penal law as a rule are found in the substantive law, have been included in criminal procedure or are regulated by separate legislation. For instance, separate legislation deals with various aspects of juvenile delinquency, crime prevention, etc. In addition, certain matters are dealt with in local legislation.

As the Penal Code of India is now in force in two separate jurisdictions, where the Indian and Pakistani texts diverge, the former is given in italics and the latter in square brackets.

The translation is impeccable. However, the author saw fit to substitute German terminology for certain terms which were adopted in English from the languages of India.

KAZIMIERZ GRZYBOWSKI

SMITH, R. A. *Labor Law. Cases and Materials.* 2d. ed. Indianapolis: The Bobbs-Merrill Co., Inc., 1953. Pp. 1003.

The second edition of Professor Russell A. Smith's valuable book on "Labor law" constitutes, in fact, a substantial volume that will, without any doubt, instruct the student, the lawyer, the collective bargainer, and in general everyone interested in social law and labor relations. Although this book includes no general exposition making clear at the outset or in conclusion, the main lines of the work for a reader more concerned with the general sense of evolution or ideas than with facts or circumstances, nevertheless the general scheme of the book may be clearly seen in the table of contents.

In the first Part forming the introduction, the author describes in a first chapter the background of American labor law. Here are included the earliest labor cases, common law dispositions, and traditional legal privileges of employers in dealing with unionism.

In chapter two, the author retraces the legislative progress that has occurred in this field, starting with the

sporadic measures at the beginning and ending with the comprehensive measures carried out especially by the recent Roosevelt administration.

The second Part deals with the expansion of unionism. It contains materials concerning: rights and obligations of employers and unions with respect to unionization, settlement of representation questions for purposes of collective bargaining, union security, special procedural and jurisdictional problems in connection with labor relations acts, unionism in regard to public services and vital industries.

Part Three concerns the collective bargaining process and enforcement of collective agreements, as well as the voluntary arbitration of labor disputes.

The last Part deals with external and internal relations of unions.

Each one of these Parts shows the same careful documentation including legislation, cases, and even doctrine. Beyond its documentary interest that should be clearly stressed, the book is designed to facilitate the reader's investigations. Thus the main object of this work is to inform. One might wish, moreover, that such a useful document were completed by a synthesis giving a general view of the subject and throwing light on its profound meaning. Such fusion of two trends: analysis and synthesis, would satisfy at the same time researchers and those fond of concrete data, as well as those who like to extract from scientific works the substance of things and institutions.

RENÉE PETIT

GALENSON, W. *The Danish System of Labor Relations*. Cambridge, Massachusetts: Harvard University Press, 1952. Pp. 321.

In the series of Wertheim Fellowship Publications of the Harvard University, this is the author's second publication, following his work on *Labor in Norway*, 1949. It is the author's merit now to bring also the Danish labor law to international attention. The characteristics of Danish labor relations are, according to Mr. Galenson's book, quiet and steady development since the "September Agreement" in 1899 that was concluded after an extended labor dispute. Based upon this "labor constitution," the Danish employers' and employees' organizations built up a solid system of labor relations that, assisted by statutory mediation law, is able to settle labor disputes usually before strikes and lockouts occur.

Giving first a historic review, Galenson furnishes interesting information about the structure, policies, and internal problems of the Danish Federation of Labor and the Danish Employers' Association. The system of collective bargaining and the settlement of contract disputes is analyzed. The law of industrial relations is explained with special stress upon the duties of shop stewards and government officials. The book also contains numerous tables and charts as well as translations of legal provisions of concern.

WOLFGANG FIKENTSCHER

CASSELMANN, P. H. *Labor Dictionary: A Concise Encyclopaedia of Labor Information*. New York: Philosophical Library, 1949. Pp. xi, 554.

The volume contains 2461 entries consisting principally of definitions of labor terms, biographical sketches, accounts of labor agencies, unions, and labor legislation. As stated by the author, the purpose of this work is "the attainment of industrial peace." The author feels that "it can make a direct contribution towards better understanding between labor and management by defining terms and delineating fields of discord."

The definitions are objective summaries, clear and concise, in which the author takes a neutral position. He shows us all the possible connotations within the labor field, illustrating the appropriate and distinctive meaning within this particular framework of

study of labor relations, practices, customs, and the rules that regulate them.

The bibliographies refer to works by individuals whose thoughts or actions have strongly influenced the dynamics of labor law. The principal abbreviations, and their meanings, employed by the labor unions are particularly useful, especially as the national labor association to which each union is affiliated (C I O or A F L) is indicated.

In the case of legislation, the most important and essential contents, with their respective dates of enactment, are given. The volume has been prepared mainly for American and Canadian users and constitutes a work of real value.

PABLO S. SINGER

Social Meaning of Legal Concepts. No. 5. *Protection of Public Morals Through Censorship.* Bernard Schwartz, ed. New York: New York University School of Law, 1953. Pp. iii, 88.

In this, the fifth in the series reproducing addresses at the New York University School of Law's annual conference, James Landis discusses "A Lawyer Looks at Censorship;" Elmer Rice, "The View of an Artist;" Horace Kallen, "The Ethical Aspects of Censorship;" and Goodwin Watson, "Some Effects of Censorship Upon Society."

The first address surveys censorship of the movies, the theatre, books, magazines, radio and television, and in nonprofessional expression, the last increasingly tending to be guided by expertness rather than commonsense. Dean Landis concludes by noting that while the educational process lies at the root of the problem, its essence is less in shielding public morals from questionable obscenity, indecency, or even radical thought, than in fending away the danger of stagnation that comes from suppression.

Elmer Rice stresses the fact that the dangers to our liberty do not come from bureaucratic sources, but almost entirely from outside the government; nonofficial censorship pervades all media for profit except the motion picture field. Those who advocate or practice suppression of free speech, either by official censorship or through the political or economic pressures of special interest groups are the enemies of democracy, states Mr. Rice. In more temperate tones, Professor Sylvester Petro comments that his attack might well have been on human illiberality and that a more spacious attitude toward ideas, works of art, and even to the problems of businessmen who are only trying to sell their products, is what we need.

Professor Horace Kallen's exposition of "The Ethical Aspects of Censorship," conceives censorship as a reaction to something deemed immoral and evil. Initially a Roman institution, carried into modern times by the Church, censorship, purporting to protect the young, permits the censor to dwell upon corruption without shame or dishonor, quite unconscious of his motives, which usually are symptomatic of a syndrome whose dominants are rooted in greed to get or keep pelf, power and prestige. "A permanent inquisition must keep examining all expression in the arts and the sciences, to make sure that nothing is laid bare which the power holders wish to keep hidden, nothing is kept hidden that they wish to uncover, that nothing they hate is made attractive, nor anything they approve made unattractive."

The final essay by Professor Goodwin Watson is concerned with the effects of censorship upon society. In it he proposes a number of hypotheses in the hope that they will be of value to agencies dealing with law making, enforcing, or interpreting problems. A reading of this, as well as the other essays, will prove well worth the time invested.

HILLIARD A. GARDINER

THOMAS, A. V. W. *Communism versus International Law. Today's Clash of*

Ideals. Dallas: Southern Methodist University Press, 1953. Pp. xiv, 145.

A well-documented presentation of the thesis that, as international law, based on democratic principles, has been a developing conception of human worth springing from Christianity and the doctrine of the rights of man, it is unrealistic to assume that international law constitutes, between the democracies and the totalitarian governments, a uniting force working for the common good.

Among the topics considered are: "Ethical and Moral Nature of International Law;" "International Law and Natural Law, Christianity, Democracy;" "Soviet Ideological Impact on International Law;" "Revitalization of Ethical and Moral Bases of International Law."

Because the Communists view all international relations as a co-operation of the toiling masses in their common opposition to capitalism, and because communist international law becomes a provisional interclass law which aims to further the interests of the organized laboring classes in their common struggle for proletarian world supremacy, there is stated to be a complete divergence between totalitarianism and the free nations on moral and ethical grounds, based on human values. Hence, the Western world must stand ready to prove to the other peoples of the universe that Western ideals are, in verity, human ideals, and that they have far more to offer than the materialistic drives of communism.

HILLIARD A. GARDINER

STOTT, D. H. *Saving Children from Delinquency*. New York: Philosophical Library, 1953. Pp. x, 266.

In this book, Dr. Stott, a research fellow at the Institute of Education of the University of Bristol, and author of "Delinquency and Human Nature," deals with the development of the child's personality, within and without the family. Introductorily, he states that the study of delinquency, like geology or medicine, or history, is really a compound of other sciences, to be knowledgeable in all of which is beyond the capacity of one individual. Suggestions are therefore offered on a limited number of topics: the community and the school, the youth club, the breakdown family, the deprived child, the imminently delinquent, and the approved school. Basically psychological, but concurrently socio-anthropological in approach, the book affords many valuable insights into behavior problems and personality patterns. Two valuable appendices are included: one, an outline of diagnosis for the use of social workers; another, on delinquency and dullness. A supplemental reading list and an index are also incorporated.

HILLIARD A. GARDINER

A Succession Bill for Israel. (September, 1953, Revision) Text and explanatory Notes prepared and published by the Ministry of Justice, State of Israel. Translated by the Harvard Law School—Israel Co-operative Research for Israel's Legal Development. (Mimeographed) Cambridge, Massachusetts: Law School of Harvard University, 1954. Pp. xi, 66.

This is a translation of the Second Draft of the Succession Bill for Israel, which is now in the final drafting stage prior to its formal submission to the Knesset (Parliament), the Hebrew version having been published in Israel to elicit the reaction of the public. For discussion of this projected legislation, see the article by Yadin, "The Proposed Law of Succession for Israel," this Journal, volume 1 (1953) 143. The present Draft indicates the changes made in response to suggestions, as summarized on pages ix–xi. Further comment is invited.

BENTWICH, N. *The Rescue and Achievement of Refugee Scholars. The Story of Displaced Scholars and Scientists 1933–1952*. The Hague: Martinus Nijhoff, 1953. Pp. xiv, 107.

This book has been written at the suggestion of the Society for the Protection of Science and Learning which succeeded the Academic Assistance Council, an organization formed in 1933. Neither the date, nor the reasons of the organization need to be elaborated. The years following World War II saw a further increase of the number of academic refugees, escaping from a differently labelled tyranny. The present book, impressive in its objectivity and restraint, is a moving account of the worldwide fellowship of science and learning, most of all of the British effort who, faced with the desperate domestic hardships caused by the war, offered nevertheless moral and material help without the taint of relief or charity. The chapter "Group Rescue," describes the transfer of institutions *en bloc* to a free community, such as the Hamburg Warburg Institute and the Daniell Sieff Research Institute; and the establishment of institutes for the reception of a larger group of scholars, such as the New School for Social Research in New York, and the development of Institutes, as that of the Institute of Advanced Studies in Princeton and in Dublin, and the placement of a great number of scientists in the Universities of Istanbul and Ankara. The wartime and postwar contribution of these scholars, dealt with in two chapters, is an evidence of the solidarity of the rescued and the success of their efforts in their respective fields of learning. An appendix of the names and an index prove by themselves the purpose for which this book has been written.

V.B.

Butterworths South African Law Review. Vol. 1. No. 1, 1954. Pp. 197.

According to the preface, this is the first volume of what the editors hope will be a regular annual publication. This new periodical has two main objects in view: Firstly, the need in South Africa for a journal which emphasizes the importance of academic study of law in the present period of intense legal development, and, secondly, for a periodical which publishes in complete and unbroken form monographs somewhat longer than those usually published in law quarterlies. The present volume, jointly edited by T. W. Price and B. Beinart, both professors of the University of Cape Town, truly satisfies these requirements with its high scholastic standard and the comparative approach of its contributions. The topics treated are: *Defence, Necessity and Acts of Authority; Putative Marriage; Constitutionalism in the South African Republics; Die Verlowing; The Legal Consequences of Contracts Concluded by a Negotiorum Gestor; Parliament and the Courts;* and *The Liability of Married Women for Household Necessaries,*—written by authors who are professors of law in South African Universities or lawyers at South African high courts, with degrees from the Universities of Leiden, Amsterdam, and Oxford. In addition to the standards aimed at and reached, this new periodical offers a real example of comparative method through its treatment of topics based on Roman legal foundations and adapted to modern conditions and the Common law.

V.B.

Books Received

Mention in this list does not preclude a later review

Argentina

Cossio, C. *Teoría de la Verdad Jurídica.* Buenos Aires: Editorial Losada, 1954. Pp. 332.

Malagarriga, C. C. *Tratado Elemental de Derecho Commercial.* Vol. 1: *Comerciantes-Sociedades*; Vol. 2: *Contratos y Papeles de Comercio*; Vol. 3: *Transportes y Seguros*; Vol. 4: *Quiebras y Prescripción.* Buenos Aires: Tipográfica Editora Argentina, 1951–2. Pp. 1050; 960; 627; 648.

Belgium

van Dievoet, E. *Catalogue de la Bibliothèque Internationale des Assurances de Louvain.* Louvain: Assurances du Boerenbond Belge, 1954. Pp. xv, 447.

Brazil

Langrod, G. *O Processo Legislativo na Europa Ocidental.* Rio de Janeiro: Fundação Getúlio Vargas, 1954. Pp. 131.

Valladão, H. *Unidade ou Pluralidade da Sucessão e do Inventário e Partilha, no Direito Internacional Privado.* São Paulo: (Separata da "Revista dos Tribunais," Outubro de 1952, Volume 204). Pp. 37.

Chile

Olavarría, Ávila, J. *Letras y Cheques.* Cartillas del instituto histórico y bibliográfico de ciencias jurídicas y sociales. No. 5. Santiago: Editorial Jurídica de Chile, 1953. Pp. 127.

France

Five European Conventions (II—XII—1953). Strasbourg: Council of Europe, Directorate of Information, 1954. Pp. 79.

Incoterms 1953. International Rules for the Interpretation of Trade Terms. Paris: International Chamber of Commerce. Lecram Press, 1953. Pp. 69.

Planiol, M.—Ripert, G. *Traité Pratique de Droit Civil Français* (2d ed.). Tome XI, *Contrats Civils.* Rouast, A. —Lepargneur, J.—Savatier, R.—Besson, A. Paris: Librairie Générale de Droit et de Jurisprudence, 1954. Pp. viii, 1111.

Scholten, P. *Traité de Droit Civil Néerlandais. Partie Générale.* Préface de Georges Ripert. Zwolle: W. E. J. Tjeenk Willink; Paris: Librairie Générale de Droit et de Jurisprudence, 1954. Pp. xii, 189.

Trade Terms. Paris: Lecram Press, 1953. Pp. 135.

Travaux du Comité Français de Droit International Privé. Neuvième à treizième années (1948–1952). Paris: Librairie Dalloz, 1953. Pp. 218.

Tunc, A.—Tunc, S. *Le Système Constitutionnel des Etats-Unis d'Amérique. Le Système Constitutionnel Actuel.* Vol. II. Les Systèmes de Droit Contemporains, V. Paris: Éditions Domat Montchrestien, 1954. Pp. 541.

L'Unification Interne du Droit Privé. (Paris, 6–10 Octobre 1954). Paris: Centre National de la Recherche Scientifique, 1954. Pp. 138.

Valladão, H. *Message aux Juristes de La Paix.* Paris: Librairie du Recueil Sirey, 1953. Pp. 32.

Germany

Enneccerus, L.—Kipp, Th.—Wolff, M. *Lehrbuch des bürgerlichen Rechts.* Vol. II. *Recht der Schuldverhältnisse.* 14th ed. by Lehmann, H. Tübingen: J. C. B. Mohr (Paul Siebeck), 1954. Pp. xvii, 1052.

Faller, F. *Die rechtsphilosophische Begründung der gesellschaftlichen und staatlichen Autorität bei Thomas von Aquin.* Sammlung Politeia, Veröffentlichungen des Internationalen Instituts für Sozialwissenschaft und Politik, Universität Freiburg/Schweiz,

Band V. Heidelberg: F. H. Kerle Verlag, 1954. Pp. 86.

HONKASALO, B. *Das Finnische Strafgesetzbuch.* Sammlung ausserdeutscher Strafgestzbücher in deutscher Übersetzung. Berlin: de Gruyter & Co., 1954. Pp. xii, 110.

MENGER, DR. C.-F. *System des verwaltungsgerichtlichen Rechtsschutzes.* Tübingen: J. C. B. Mohr (Paul Siebeck), 1954. Pp. xxiv, 262.

MÜNCH, F. *Die Bundesregierung.* Völkerrecht und Politik. Vol. 2. Frankfurt: Alfred Metzner Verlag, 1954. Pp. xv, 223.

PAULICK, H. *Die Eingetragene Genossenschaft als Beispiel gesetzlicher Typenbeschränkung.* Tübingen: J. C. B. Mohr (Paul Siebeck), 1954. Pp. xv, 204.

REINACH, A. *Zur Phänomenologie des Rechts.* München: Kösel-Verlag, 1953. Pp. 225.

SCHWARZ-LIEBERMANN VON WAHLENDORF, H. A. *Some Aspects of the Influence of Procedure and Composition on the Material Achievements of International and Supranational European Organizations.* Bonn: Bonner Universitäts—Buchdruckerei Gebr. Scheur G.m.b.H., 1954. Pp. 47.

STREBEL, H. *Die Verschollenheit als Rechtsproblem.* Frankfurt am Main: Alfred Metzner Verlag, 1954. Pp. v, 147.

Völkerrecht und Völkerpflicht. Beiträge zur Verbreitung des Völkerrechts. Keller, Hans, K. E. L. ed. München: Verlag der Grotius-Stiftung Vol. II., 1954. Pp. 127.

GREAT BRITAIN

Current Legal Problems 1954. Keeton, G. W.—Schwarzenberger, G. eds. Volume 7. London: Stevens & Sons Ltd., 1954. Pp. vii, 236.

Legal Research Topics in British Universities Notified as Current during the Session 1953-54. 5th ed. London: University of London, Institute of Advanced Legal Studies, July 1954. Pp. 11. (Mimeographed).

SCHMITTHOFF, C. M. *The English Conflict of Laws.* 3rd ed. London: Stevens & Sons Ltd., 1954. Pp. xliii, 514.

WALKER-WATSON, W. *The Finance of Landownership. A Policy for the Agricultural Landowner.* London: Frederick Warne & Co., Ltd., 1954. Pp. x, 245.

INDIA

ALTEKAR, A. S. *Sources of Hindu Dharma in its Socio-Religious Aspects.* Sholapur: Institute of Public Administration, 1952. Pp. viii, 71.

PATEL, B. D. *The Indian Land Problem and Legislation.* Bombay: N. M. Tripathi, Ltd., 1954. Pp. xvi, 534.

PAWATE, I. S. *Contract and the Freedom of the Debtor in the Common Law.* Bombay: N. M. Tripathi, Ltd., 1953. Pp. xiii, 148.

SHARMA, S. R. *Some Independent Governmental Agencies in the Indian Constitution.* Sholapur: Institute of Public Administration, 1953. Pp. 64.

SHARMA, S. R. *The Supreme Court and Judicial Review in India.* Sholapur: Institute of Public Administration, 1953. Pp. viii, 50.

SOONAVALA, R. K. *Advocacy, Its Principles and Practice.* Bombay: N. M. Tripathi, Ltd., 1954. Pp. xii, 957.

The Indian Year Book of International Affairs 1953. Madras: The Indian Study Group of International Affairs, University of Madras, 1953, Pp. x, 509.

ITALY

Bibliographical Notes on the Movement for the Unification of Law. Rome: Éditions "Unidroit", 1954. Pp. 54.

MATTEUCCI, M. *Activity of the International Institute for the Unification of Private Law.* Rome: Éditions "Unidroit", 1954. Pp. 57.

Mémoires de l'Académie Internationale de Droit Comparé. Vol. III, Parts I-III. Istituto Italiano di Studi Legislativi. Roma: Ministero di Grazia e Giustizia, 1953. Pp. cxliii, 625; 485.

Report on the Activity of the International

Institute for the Unification of Private Law, 1953. Rome: Éditions "Unidroit," 1954. Pp. 41. (In French and English).

Unification of Law. A General Survey of Work for the Unification of Private Law (Drafts and Conventions). Vol. 3. International Institute for the Unification of Private Law. Rome: Éditions "Unidroit", 1954. Pp. 783.

Mexico

Siqueiros P. J. L., *Las Sociedades Extranjeras en Mexico.* Mexico: Imprenta Universitaria, 1953. Pp. 198.

Netherlands

Guins, G. C. *Soviet Law and Soviet Society.* The Hague: Martinus Nijhoff, 1954. Pp. ix, 457.

International Court of Justice. *Case of the Monetary Gold Removed From Rome in 1943.* (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America). Judgment of June 15th, 1954. Leyden: A. W. Sijthoff, 1954. Pp. 30.

International Court of Justice. *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal.* Advisory Opinion of July 13, 1954. Leyden: A. W. Sijthoff. Pp. 54.

International Court of Justice. *Treatment in Hungary of Aircraft and Crew of United States of America.* Order of July 12, 1954. Leyden: A. W. Sijthoff Pp. 6.

Jacobini, H. B. *A Study of the Philosophy of International Law as Seen in Works of Latin American Writers.* The Hague: Martinus Nijhoff, 1954. Pp. viii, 158.

de Muralt, R. W. G. *The Problem of State Succession with Regard to Treaties.* The Hague: Lankhout-Immig N.V., 1954. Pp. 165.

van Raalte, Dr. E. *De Ontwikkeling van het Minister-Presidentschap.* Leiden: Universitaire Pers Leiden, 1954. Pp. xi, 226.

Norway

Eckhoff, T. *Rettsvesen og Rettsvitenskap i U. S. A.* Oslo: Akademisk Forlag., 1953. Pp. xv, 343.

Rommetveit, R. *Social Norms and Roles.* Oslo: Akademisk Forlag, 1953. Pp. xi, 167.

South Africa

Annual Survey of South African Law 1953. The Faculty of Law, University of the Witwatersrand. Cape Town: Juta & Co., Ltd., 1954. Pp. xxxiii, 324.

Herbstein, J.—Van Winsen, L. D. *The Civil Practice of the Superior Courts in South Africa.* Cape Town: Juta & Co., Ltd., 1954. Pp. lii, 736.

Spain

Brutau, J. P. *Fundamentos de Derecho Civil.* Tomo II, Volumen I. *Doctrina General de Contrato.* Barcelona: Casa Editorial Bosch, 1954. Pp. 426.

Linares, C. M. *Los Procesos Monetarios en Hispanoamerica.* Madrid: Ediciones Cultura Hispánica, 1953. Pp. xvi, 155.

Palacios, J. A. *El Mito de la Democracia.* Madrid: Ediciones Cultura Hispánica, 1953. Pp. xxxiv, 425.

Perpiña, R. *La Crisis de la Economía Liberal. Del Ethos Económico al de Seguridad.* Madrid: Ediciones Cultura Hispánica, 1953. Pp. 154.

Sobrino, J. A., S.J. *Introducción Crítica a los Estados Unidos.* Madrid: Ediciones Cultura Hispánica, 1952. Pp. 104.

Sweden

Ekelöf, P. O. *Är den Juridiska Doktrinen en Teknik Eller en Vetenskap?* Skrifter utgivna av Juridiska Fakulteten i Lund, No. XIV. Lund: C. W. K. Gleerup, 1951. Pp. 50.

Lagergren, G. *Delivery of the Goods and Transfer of Property and Risk. A comparative study.* Institutet för Rättsvetenskaplig Forskning. Stockholm: P. A. Norstedt & Söners Förlag, 1954. Pp. 151.

Olivecrona, K. in collaboration with

NORBECK, L. *Les limites de l'action à but purement déclaratif*. Rapport général, IV[e] Congrès de Droit Comparé: Paris, 1954. Pp. 67 and supplements. (Mimeographed).

SWITZERLAND

GUBLER, FRIEDRICH T. *Besteht in der Schweiz ein Bedürfnis nach Einführung des Instituts der angelsächisschen Treuhand (trust)*? Verhandlungen des Schweizerischen Juristenvereins. Fasc. 3. Basel: Helbing & Lichtenhahn, 1954. Pp. vi, 215—476a.

BINDSCHEDLER, R. L. *Rechtsfragen der europäischen Einigung*. Basel: Verlag für Recht und Gesellschaft ag, 1954. Pp. xxv, 424.

UNITED STATES

Annual Review of United Nations Affairs, 1953. Eagleton, C.—Swift, R.N. eds. New York: New York University Press, 1954. Pp. viii, 213.

BARTHOLOMEW, P. C. *Summaries of Leading Cases on the Constitution*. Ames, Iowa: Littlefield, Adams & Co., 1954. Pp. xxv, 334.

BROWN, ELIZABETH G. *Digest of Procedural Statutes and Court Rules. Pleading, Joinder, and Judgment Record*. Produced as part of a research project financed with funds derived from gifts to the University of Michigan by William W. Cook. Ann Arbor: The Overbeck Company, 1954. Pp. viii, 174.

COATES, G. R. *Law and Practice in Chattel Secured Farm Credit*. Madison: The University of Wisconsin Press, 1954. Pp. xi, 105.

Constitutional Law. Cases and Other Problems. (Freund, P. A.—Sutherland, A. E.—De Wolfe Howe, M.—Brown, E. J.). Vol. 1. Boston: Little, Brown & Company, 1954. Pp. lxvi, 726.

DICKERSON, R. *Legislative Drafting*. Boston: Little, Brown & Company, 1954. Pp. xvi, 149.

DIRLAM, J. B.—KAHN, A. E. *Fair Competition. The Law and Economics of Antitrust Policy*. Ithaca: Cornell University Press, 1954. Pp. xi, 307.

FERGUSON, J. H.—MCHENRY, D. E. *Elements of American Government*. 2nd ed. New York: McGraw-Hill Book Co., Inc. 1954. Pp. x, 649.

FORD, A. W. *The Anglo-Iranian Oil Dispute of 1951–1952*. Berkeley: University of California Press, 1954. Pp. ix, 348.

GRADWOHL, R. B. H. *Legal Medicine*. St. Louis: The C. V. Mosby Co., 1954. Pp. xvii, 1093.

KONVITZ, M. R. *Bill of Rights Reader. Leading Constitutional Cases*. Ithaca: Cornell University Press, 1954. Pp. xix, 591.

KOVRIG, B. *Hungarian Social Policies (1920–1945)*. Little Hungarian Library, Vols. IV, V. New York: Committee for Cult and Education of the Hungarian National Council, 1954. (In Hungarian, with English synopsis). Pp. 228.

LAUBE, W. T. *Williston's Cases on the Law of Contracts*. 6th ed. Boston: Little, Brown and Co., 1954. Pp. xxvi, 1233.

MCNAIR, A. D. *The Development of International Justice*. New York: New York University Press, 1954. Pp. 34.

MUÑOZ, Dr. H. C. *Statement of the Laws of Uruguay*. (2d ed.), Supplement No. 1. Washington: Pan American Union, 1954. Pp. 29.

Origins of the Natural Law Tradition. HARDING, A. J. ed. Dallas: Southern Methodist University Press, 1954. Pp. viii, 96.

Physician in the Courtroom. (ADELSON, L.—CLINTON, D.—GERBER, S. R.—MORITZ, A. R.) Cleveland: The Press of Western Reserve University, 1954. Pp. 99.

Practice and Procedure under the Immigration and Nationality Act. Proceedings of the New York University Conference, held on June 13, 1953. Sellin, H. ed. New York: Oceana Publications, 1954. Pp. xii, 145.

SALLABERREN, R. *Statement of the Laws of Argentina in Matters Affecting Business*. (2d ed.), Supplement No. 1. Washington: Pan American Union, 1954. Pp. 28.

SCHIFFER, W. *The Legal Community of Mankind.* New York: Columbia University Press, 1954. Pp. x, 367.

SHELDON, B., JR. *The Fifth Freedom. Freedom from Taxation.* New York: Library Publishers, 1954. Pp. xiii, 111.

Status of the Pan American Treaties and Conventions (Revised to September 1, 1954). Law and Treaty Series. Washington: Pan American Union, 1954. Pp. iv, 31. (In Spanish, English, Portuguese, and French).

STONE, J. *Legal Controls of International Conflict.* New York: Rinehart & Company, 1954. Pp. lv, 851.

The Middle East. A Political and Economic Survey. New York: Royal Institute of International Affairs, 1954. Pp. xviii, 590.

TORFF, S. H. *Collective Bargaining. Negotiations and Agreements.* New York: McGraw-Hill Book Co., Inc. 1953. Pp. ix, 323.

Twentieth Annual Report of The Judicial Council of The State of New York. Legislative Document (1954). No. 46. Albany: Williams Press, Inc., 1954. Pp. 323.

UNITED NATIONS PUBLICATIONS

Expert Committee on Drugs Liable to Produce Addiction. 4th report. World Health Organization Technical Report Series. No. 76. Geneva: World Health Organization, 1954. Pp. 12.

Narcotic Drugs. Summary of Illicit Transactions and Seizures. Vol. VII, No. 6. March 15, 1953; Vol. VIII, No. 6. January 15, 1954; Vol. IX, No. 1. March 15, 1954. New York: United Nations Publications, E/NS.

Unesco Copyright Bulletin. Vol. VII, No. 1. *The Double Taxation of Copyright Royalties.* (In English and French). Paris: Unesco, 1954. Pp. 109.

Bulletin

Special Editor: KURT H. NADELMANN

American Foreign Law Association

REPORTS

AMERICAN FOREIGN LAW ASSOCIATION—At the annual meeting of the American Foreign Law Association on March 24, (this Journal, page 309), a constant growth in membership was reported. The Association had continued its participation in the American Association for the Comparative Study of Law, Inc., and its representation on the Editorial Board of the American Journal of Comparative Law, as well as on the Bureau of the International Committee for Comparative Law as the United States National Committee. It participated in the conference on "Man's Right to Knowledge and the Security of the Community" held in connection with Columbia's bicentennial celebration and co-sponsored a celebration in New York of the 150th anniversary of the French Civil Code. It was represented by delegates at various national and international meetings, including the Munich 1954 session of the International Committee for Comparative Law. Luncheon meetings in New York were addressed by Dr. Andrew Martin on "The Post-War Treatment of Enemy Property in the United Kingdom," Mr. George Nebolsine on "Anti-Trust and Comparative Law," Dr. F. A. Mann on "Confiscation and its International Effects," and Professor Harold J. Berman on "Some Legal Aspects of Soviet Foreign Trade."

THE SECTION OF INTERNATIONAL AND COMPARATIVE LAW OF THE AMERICAN BAR ASSOCIATION—The Section of International and Comparative Law of the American Bar Association held its annual meeting in Chicago on August 17, 1954, with Professor Whitney R. Harris of Southern Methodist University in the chair. Activities began with a breakfast of the Comparative Law Division held jointly with the Chicago Chapter of the American Foreign Law Association. Co-chairmen for the occasion were Victor C. Folsom of New York and Antonio Rosas Sarabia representing the two sponsoring organizations respectively. The guest of honor was the Columbian Ambassador, Zuleta Angel, former Chief Justice of Columbia.

Speakers at the breakfast were Professor Edward D. Re of St. John's University Law School, New York, discussing recent New York cases involving foreign law, and Professor Homer G. Angelo of Stanford University Law School discussing practical problems arising under California statutes in proving foreign law.

In the international law sessions which followed the breakfast, the Section was addressed by Brig. Gen. Nathan William MacChesney, one of the founders of the Section. He reviewed the years since 1934 in the history of the Section, indicating the waves of success followed by lean years and expressed his conviction that at this time in the history of the United States the Section had again come into a period of great importance. The discussion which followed concerned revision of the United Nations Charter in preparation for the 1955 charter revision meeting of the United Nations, while the afternoon discussion centered around legal problems raised by the inauguration of the expanded Great Lakes–St. Lawrence seaway.

Once again a joint luncheon was held with the Junior Bar Association at which the speaker was Sir David Maxwell Fyfe, Home Secretary of the United Kingdom. He explained in detail the procedure in Great Britain in ratifying

treaties and implementing them in domestic legislation so as to clarify issues raised in the debate accompanying the introduction of the so-called Bricker Amendment.

In view of Professor Whitney Harris' appointment as Executive Secretary of the American Bar Association it became necessary to depart from custom and elect a new Chairman before the expiration of two years. Harris' place was filled by the election of Professor Brunson MacChesney of Northwestern University Law School, while other officers remained the same. Since the meeting the Section has been saddened by the death of its first Vice Chairman, George Maurice Morris of Washington, a former President of the American Bar Association and long-time officer of the Section, and Brig. Gen. Nathan William MacChesney, its oldest living past Chairman.

JOHN N. HAZARD

COMMITTEE OF FOREIGN LAW, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK—As in former years, the Committee's activities for 1953–54 can be grouped under three broad categories: research and recommendation, sponsorship of lectures, and entertainment and hospitality.

(1) For many years the Committee has urged enactment of a statute which would provide appropriate procedures for taking interrogatories in a foreign language. Last year the bill prepared by the Committee passed the Assembly but was defeated in the Senate. This year the bill passed both houses and was signed by the Governor. It adds a new section (309-a) to the New York Civil Practice Act.

The *Record* for January contains four recommendations by the Committee for the amendment of the Trading with the Enemy Act of 1917. Probably the most important of these would provide for the return by the United States of assets belonging to West Germany or to West German nationals.

The Committee considered the general problem of participation by the United States in international conferences dealing with private international law. It determined that, at least, observers should be sent to such conferences. This recommendation was conveyed in person to the Legal Adviser of the State Department. The Committee has also embarked upon an investigation of the treaty-making process, particularly with respect to treaties of friendship, commerce, and navigation.

The Committee continued its investigation of the treatment accorded American judgments and arbitral awards throughout the British Commonwealth and in Latin-American countries.

A study concerned with the effect accorded foreign monetary legislation by the New York courts has been published in the *Record*.

(2) The Committee's annual symposium was concerned this year with sovereign immunity and the act of state doctrine. The speakers were Professor Philip C. Jessup, Professor Jack B. Tate, and Judge Charles E. Clark of the United States Court of Appeals, Second Circuit. The Committee likewise sponsored a celebration commemorating the 150th Anniversary of the French Civil Code. In addition, the Committee played a part in arranging for the conference held in January at the Association Building in honor of the Bicentennial Anniversary of Columbia University.

(3) One of the Committee's most pleasant functions is the entertainment of lawyers from abroad. In February, the Committee, joined by the Executive Committee and the Committee on International Law, entertained the United Nations lawyers at an informal reception. Other foreign lawyers were entertained on other occasions by one or more Committee members.

WILLIS L. M. REESE

CONFERENCES

INTERNATIONAL COMMITTEE FOR COMPARATIVE LAW—The International Committee for Comparative Law will change its name and enlarge the scope of its work if member associations accept a proposal made by the Executive Bureau at its Munich meeting, July 28–29, 1954. In order to reach more people, the name will become International Association of Juridical Sciences, and the statement of purposes will be expanded to include the encouragement of the development of juridical sciences throughout the world. As with other international associations, emphasis will be placed upon the sharing of experience in the belief that in many fields of the law it is possible to profit from the mistakes and successes of others.

Professor André Bertrand, Director of Studies of the French National School of Administration, was elected secretary general to fill the vacancy caused by the resignation of Professor René David on the occasion of his appointment to draft a civil code for Ethiopia. To develop an expanded research program for the International Association, Dr. Kurt Lipstein of Cambridge, England, was named Director of Scientific Work. The Executive Bureau appointed Professor Felipe de Sola Cañizares of Barcelona to direct the work of a newly created committee to prepare a directory of comparative law centers throughout the world.

A schedule of future meetings was established with a meeting of the Executive Bureau set for September, 1955, at Istambul or the Hague to be accompanied by a small colloquium of experts which will prepare the materials for discussion at a larger colloquium to be held at Barcelona in September, 1956. Panels are planned for Barcelona on (1) legal education, using as the basis for discussion the report by Professor Charles Eisenmann which has been published in July, 1954, by UNESCO; (2) the maxim *"audi alteram partem"* to be chaired by Professor F. H. Lawson of Oxford, and (3) the impact of foreign legal systems upon the social structure of underdeveloped countries. There will also be a panel of experts under the chairmanship of Professor Max Rheinstein of the University of Chicago to make preparations for discussion in the following year of the question of the contribution of law to the stability of the family as an institution. This subject will probably be the central theme of a Bureau meeting and colloquium to be held in September, 1957, in Chicago.

Two discussions were held by colloquiums meeting just prior to the Munich meeting of the Executive Bureau. Professor Hessel E. Yntema of the University of Michigan presided over the one devoted to a consideration of the role and structure of comparative law centers and institutes. Judge Marc Ancel, secretary general of the French Center of Comparative Law, was the general reporter. A second colloquium met under the chairmanship of Professor Otto Riese, of the Court of the European Iron and Steel Community, with Professor Paul Guggenheim of the Institut des Hautes Etudes Internationales of Geneva as general reporter. It considered the question posed for it by UNESCO of the manner in which treaties are implemented in the municipal law of a selected list of countries. Professor G. I. Mangone of Swarthmore reported on the United States procedure.

JOHN N. HAZARD

COLLOQUIUM ON COMPARATIVE LAW INSTITUTES—Under the auspices of the International Committee for Comparative Law, a Colloquium was held in Munich, July 23–27, 1954, on the Rôle and Organization of Comparative Law Institutes. Institutions in Austria, Belgium, Brazil, England, France, Western Germany, Greece, Lebanon, Mexico, the Netherlands, Northern Ireland, the Saar, Spain, Sweden, Switzerland, Turkey, the United States, Venezuela, and Yugoslavia had sent representatives.

From the United States, Messrs. John N. Hazard, Columbia University, Kurt H. Nadelmann, Inter-American Law Institute and Institute of Comparative Law, New York University, Max Rheinstein, University of Chicago, Charles Szladits, Parker School of Foreign and Comparative Law, Columbia University, and Hessel E. Yntema, University of Michigan, attended. Professor Yntema was in the chair. Judge Marc Ancel, secretary general of the French Center of Comparative Law, was general reporter. The starting point of the discussion was a report prepared by the general reporter on the basis of information received in answer to a questionnaire addressed to various institutions. The first part of the session was devoted to collection of detailed information on the organization and operation of the various institutions working in the field. Suggestions for improved co-operation and co-ordination of the work of the institutions as well as for improvements in comparative law work were made and incorporated in a set of resolutions which were adopted unanimously at the end of the meeting.

The resolutions, in addition to dealing with better co-operation among the institutions, relate to such questions as professorships for comparative law, required courses which will convey at least a minimum on foreign legal systems and the comparative method to the students, arrangement of special courses on the domestic law for the purposes of foreign students, vacation courses for foreign students, scholarships for training periods at institutions abroad, facilitation of acquisition and exchange of foreign legal publications, and preparation of annual surveys on the development of the law in the various countries. Both the report of the secretary general and the resolutions will be published.

The German National Committee, headed by Professor Dölle, was in charge of the technical organization of the meeting, which was held in the Conference Building of the *Deutsches Museum*. The excellent organization of the meeting was acknowledged in resolutions of thanks voted by the Colloquium, extended also to the cahirman and general reporter of the meeting and to Professor André Bertrand, secretary general per interim of the International Committee of Comparative Law. Receptions and an excursion into the Bavarian Alps added to the pleasure of the participants.

A number of those present stayed over in Munich to attend the annual congress of the German Association for Comparative Law which was devoted to "Legal Problems of European Co-operation."

K. H. N.

FOURTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW—The fourth International Congress of Comparative Law was held at the Faculté de Droit of the University of Paris, August 1–7, 1954. A delegation of thirty Americans headed by Roscoe Pound and Hessel E. Yntema as members of the sponsoring International Academy of Comparative Law attended. Ninety subjects under eighteen broad headings attracted 250 experts from eighteen countries. As usual at these congresses, the subjects ran the gamut of the legal sciences, from history and philosophy to current subjects of sharp conflict such as limitations on the liability of air carriers and suspension of the employment contract during a strike.

Most panels sought to establish the world experience in the sphere of law concerned so as to determine trends, if possible. Some panels terminated discussion by expressing conclusions in terms of wishes or resolutions as to what was to be hoped for in future development. Thus, the labor law panel opposed amalgamation of workmen's compensation schemes with general social security programs; the public law panel debated the advisability of state interference in the internal affairs of political parties to preserve democratic principles in communities where there is no real choice in parties offered the voter; the air law panel opposed the present limitations on liability of carriers and favored the

extension of insurance principles to air accidents. The impact of social security ideas upon the law shared with the role of volition in the law in the discussion of the legal philosophers. And the procedural law panel developed lively concern over the place of the record in the trial.

Forty-seven papers were contributed by Americans to be digested by general reporters chosen for each subject. In most cases men with sharply different legal backgrounds were chosen to prepare the digests, so that the panels heard differing approaches based on the same materials and facts.

As usual the Congress was principally the work of the Academy's Permanent Secretary General, Professor Elemér Balogh. He and others read papers at the two plenary sessions presided over by Roscoe Pound as President of the Academy. At these sessions the President summarized a paper entitled "Comparative Law in Time and Space." Of major interest to American comparatists was a paper by Professor Takanayagi concerning the impact of the American occupation upon the law of Japan.

JOHN N. HAZARD

EDINBURGH CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION—The forty-sixth Conference of the International Law Association met at Edinburgh August 8–14, 1954. Some 250 members from 23 countries attended, among them about 25 members of the American Branch, led by Professor Clyde Eagleton, Branch president. The Branch had prepared reports printed in the 1954 Proceedings and Committee Reports of the Branch. The Conference was opened by President Max Gutzwiller of Switzerland. Lord Normand was chosen as the new President. The Secretary General, Mr. W. Harvey Moore, Q.C., spoke on "The Present Status of International Law." The Conference dealt with "Review of the United Nations Charter," "Insolvency," "International Monetary Law," "Air Law," "Inland Water Rights," "International Company Law," "Recovery and Enforcement of Maintenance Orders," and "Rights to the Sea Bed and Subsoil." Various resolutions were adopted. The Committee on the Review of the United Nations Charter headed by Judge Boeg of Denmark, with Dr. Schwarzenberger of Great Britain as reporter, was kept in being, with regional and Branch study groups to be established. On Insolvency, a British Branch Committee proposal suggesting a world bankruptcy law with a world bankruptcy court was adopted "in principle" against opposition. The Committee on International Monetary Law, headed by Professor Gutzwiller, with Dr. F. A. Mann of Great Britain as reporter, was asked to continue its work with a view especially to clarifying Article VIII, 2 (b) of the Bretton Woods Agreement. On Inland Water Rights, it was decided to have the various legal, economic, and technical aspects studied by a new committee to be chaired by Professor Eagleton. For Family Relations, the Conference approved, with some qualifications, the Draft Convention known as Annex I of the report of the committee of legal experts appointed under the United Nations for the recovery and enforcement of maintenance orders. On Seabed and Subsoil, the Conference endorsed in substance the draft Articles on the Continental Shelf prepared by the International Law Commission. The technical preparation of the meeting, which was excellent, was in the hands of the Scottish Organizing Committee. The City of Edinburgh gave a dinner in the Assembly Rooms and the British Government a reception in the Parliament Hall, on which occasion Edinburgh Castle was floodlit.

K. H. N.

FIFTH INTERNATIONAL CONFERENCE OF THE LEGAL PROFESSION—The Fifth International Conference of the Legal Profession under the auspices of the International Bar Association was held in Monte Carlo, Monaco, July 19–24, 1954. Approximately 300 members of the profession were in attendance from 39 countries.

The following topics were discussed in

symposia and plenary sessions: "Economic Warfare, particularly the aspect relating to restitution of private property which has been vested or blocked," as outlined in papers by Pierre Coppens of Belgium, J. J. Ellis, Attorney General of the Netherlands Antilles, William Harvey Reeves, Norma Roth, Otto C. Sommerich, and Martin Domke of the United States, H. Vornefeld and Eugen Langen of Germany, Ludwig Draxler of Austria, and Thomas Givanovitch of Yugoslavia; "Taking Evidence Abroad by way of Documents and/or Testimony," with papers by Professor B. Goldman of France, and Barent Ten Eyck and Harry LeRoy Jones of the United States; "Extra-Territorial Effects of Divorces and Separations," as developed in a paper by Professor Hermann Schwenn of Germany; "International Code of Ethics for Lawyers," a draft code having been prepared by Drs. J. R. Voute and L. Hardenberg of the Netherlands, with comments by Werner Kalsbach of Germany; "Experience with Treaties to Avoid Double Taxation," with papers by John Senter, Q.C., of England, J. van Hoorn, Jr. and J. van der Ven of the Netherlands, and Franz Martin Joseph and Leo M. Drachsler of the United States; "International Aspects of Nationalization," as outlined in a Committee Report which included individual papers by Franz Martin Joseph, United States, Sir Hartley Shawcross of England, Parviz Kazemi of Iran, Ignaz Seidl-Hohenveldern of Austria, and Michael Brandon of the United Nations. A paper was also presented by James N. Hyde of the United States; "Constitutional Structure of the United Nations in the Light of the Proposed Amendatory Conference of 1955." Work on the Committee Report was begun two years ago under the chairmanship of the Honorable Amos J. Peaslee, secretary general on leave, now serving as American Ambassador to Australia; and Mr. Peaslee enlisted the co-operation of outstanding members of the judiciary in many nations of the world. Dr. S. S. Nehru of India, Dr. J. Weisbart of Switzerland, and Dr. Eduardo Theiler of Brazil also presented papers on this topic. The principal address of the Conference was delivered by Sir Hartley Shawcross, Q.C., M.P., of England, entitled, "The Enforcement of the Rules of Law in International Affairs." The following officers of the Association were elected at the Monaco Conference: Speaker of the House of Deputies, George Maurice Morris of Washington, D. C. (who passed away August 21, 1954); Secretary General on leave, The Honorable Amos J. Peaslee; Acting Secretary General, Gerald J. McMahon of New York; and Treasurer, Thomas G. Lund, of London.

GERALD J. MCMAHON

FIRST INTERNATIONAL CONGRESS OF SOCIAL LAW—The first International Congress of Social Law, convoked by the *Sociedade Internacional de Direito Social*, was held in São Paulo, Brazil, August 8–15, 1954, under the patronage of the Commission for the celebration of the "Quatro Centenario de São Paulo." There were 168 registered participants and hundreds of lawyers, law students, and other auditors.

The congress, splendidly organized under the direction of Professor Dr. A. F. Cesarino Junior of the Law School of the University of São Paulo, assisted by Professor Rui de Azevedo Sodré, of the Santos Law School, held its sessions in the beautiful building of the São Paulo Law School.

The congress took for its task four inquiries, namely, into the legal nature and the characteristics of the individual employment contract, the collective contract, social insurance law, and "varia," i.e., problems not included in these fields. Four commissions were constituted. On the first day, the congress as a whole listened to reports from the various countries represented, on the last day to the reports from the four commissions which were discussed. Professors Tissembaum (Santa Fé, Argentina), Chiarelli (Rome), Deveali (Eva Peron, Argentina), and Linares (Santiago, Chile) acted as reporters for the four commissions, respectively.

Professors Tullio Ascarelli (Rome), Dietz (Münster, Germany), Kahn-Freund (London), Van Goethem (Louvain, Belgium), Arturo Jaeger (Milan), Comba (Turin), and Lenhoff (Buffalo), besides the representatives from every Latin-American country, delivered addresses and spoke in the commissions.

It was a working congress which finished its activities with the formation of an International Association of Social Law. There was consensus that Dr. Cesarino should be president. His eminence and versatility has been highlighted not only in the conference halls but equally significantly within his ambidexterous practice of both law and medicine, an achievement seemingly unique. Professor Tissembaum was elected secretary general.

Considerations of space prevent this reporter from telling more about the unforgettable hospitality and the splendid social events during the congress.

ARTHUR LENHOFF

INTERNATIONAL ASSOCIATION FOR THE PROTECTION OF INDUSTRIAL PROPERTY—The twenty-sixth congress of the International Association for the Protection of Industrial Property was held in Brussels, June 7–12, 1954. It was attended by patent, trade-mark, and copyright lawyers from 25 countries. The American group was led by Mr. B. W. Pattishall. The congress agreed on a series of resolutions and took note that the International Bureau for the Protection of Industrial Property at Berne has taken preparatory measures contemplating a revision of the Paris Convention of 1883 and of the Madrid and Hague arrangements concerning industrial and intellectual property at a diplomatic conference planned for 1957 at Lisbon. The congress accepted an invitation to hold its next biennial congress in Washington, D. C., in May 1956. This will be the first meeting of the Association in the United States in the seventy-year history of the organization. The agenda will be prepared by the Executive Committee at a meeting in Sirmione, Italy, May 30–June 3, 1955. Mr. Roy Ingersoll, of the United States, was elected President of the Association for the term 1954–1956.

INTERNATIONAL MEETING ON ARBITRATION REFORM—An "International Meeting on Arbitration Reform" was held on June 3–6, 1954, in Cadenabbia (Lake Como) and Milan, Italy, sponsored by the Italian Ministry of Foreign Affairs and conducted by the *Centro Nazionale di Prevenzione e Difesa Sociale* of Milan. There was a large attendance, representing at least twenty different countries (including Professors Elvin R. Latty of Duke University and Joseph Dainow of Louisiana State University).

The selection of the subject recognized the extensive development of private arbitration in both national and international transactions, and the meeting facilitated the exchange of views and proposals for satisfactory legislative regulation of this mode of settling disputes. Papers were presented, and there were extensive discussions on both the substantive and procedural aspects of arbitration reform. Materials were considered concerning uniform arbitration laws and the problems in connection with the unification of the rules of private international law in the matter of arbitration. The program was conducted in four official languages: Italian, English, French, and German; with simultaneous translation through earphones attached to each seat. Program materials were likewise prepared in all four languages, including the two basic reports (proposals for uniform law; unification of private law) and appendices setting out the arbitration law texts of nine different countries (including the United States), as well as the Geneva Protocol of 1923 and Convention of 1927.

In general, the conference expressed a strong favorable attitude towards wider use and greater efficacy of arbitration, and advocated the preparation of a proposed uniform arbitration law. For the private international law aspects of

arbitration, the conference favored the largest possible scope for reference to the law chosen by the parties as the basis of arbitration decisions, and a mutually helpful, co-operative attitude in the recognition of foreign arbitral awards. The resolutions adopted in the final session of the conference were unavoidably more wishful than effective. This, however, did not detract from the interest and accomplishments of the meeting. Whatever also the conference may have achieved in the international sphere, the meeting did provide a forum for a vast amount of comparative information and evaluations, concerning both substantive and procedural aspects of arbitration. If Italy is contemplating a re-examination of its laws and regulations governing arbitration, it could not have had a better preliminary program of comparative law for its legislative policy and drafting experts.

JOSEPH DAINOW

INTERNATIONAL ROUND TABLE ON PRIVATE LAW AND SOCIAL LAW—A *Colloque international* on private law and social law took place in Paris on May 13, 14, and 15, 1954, under the auspices of the *Société de Législation Comparée*. It was attended by over sixty persons, among whom were represented eleven countries, including the United States (Joseph Dainow, Louisiana State University). The group met as a single body at the Faculty of Law of the University of Paris; the discussions were informal, in round table style. The program centered on two principal topics: (1) the law of the family and social legislation and (2) the law of "enterprise" and social legislation. Professor Paul Durand of Paris presented an introductory outline of the first topic and summarized the discussions at the conclusion. Professors J. Hamel of Paris and G. Friedel of Nancy did the same for the second topic.

In the discussion of the family law topic, inquiry was directed to the influence of so-called social legislation upon the legal and factual relationships in the institutions of marriage, separation, divorce, and filiation, the effect of public social security upon the private legal obligations of support, the effect on paternal authority, and in general the increased intervention of the state into the private law of the family. One of the instances discussed was the French social legislation on "family allocations," for salary increments corresponding to the number of children; another involved the legislation concerning illegitimate children; and so forth.

On the topic of "enterprise," the discussion was more evasive because of a lack of a common meaning attributed to the term itself. The reporters suggested the definition that "an enterprise is an organized grouping of persons who place in common their capital and their work, into an economic activity from which all of them will derive an (equitable) remuneration." This served more as a point of departure for different views than a basis for compromise and agreement. In Italy, Spain, and South America, the developments of the concept of enterprise are taking different directions from those in France. Everywhere, the idea is relatively new, and may concentrate on regulation of controlled economy, on workmen's participation in management and profits, or on other aspects.

The meeting did not attempt to crystallize definite conclusions nor to propose any specific action, the objective being limited to an interchange of information and ideas. On the lighter side of the program, there was a very gracious reception by Dean Julliot de la Morandière of the Paris Faculty of Law, a delectable and impressive luncheon tendered by the *Société de Législation Comparée*, also an interesting and enjoyable visit and reception at the *Conseil d'Etat*.

JOSEPH DAINOW

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW—Two special commissions assembled in March, 1954, at The Hague in accordance with decisions taken by the Seventh Session of the Conference

held in 1951. The first commission had to deal with Transfer of Property in Case of Sale of Goods. Dean Julliot de la Morandière of the Paris Faculty of Law presided. Professor van Hecke of Louvain University was reporter. Belgium, Finland, France, Western Germany, Great Britain, Italy, Japan, Netherlands, Portugal, Sweden, and Switzerland were represented. Alternative drafts were prepared for the next Conference. The second commission had been requested to prepare a draft on Civil Jurisdiction in Case of Sales of Goods. Professor Sauser-Hall of Switzerland presided, and Professor Batiffol of the Paris Faculty of Law was reporter. Belgium, France, Great Britain, Western Germany, Italy, Japan, Luxemburg, Norway, Netherlands, Portugal, Sweden, and Switzerland had sent delegates. A preliminary draft was adopted which mainly concerned itself with the right of parties to choose a foreign court to adjudicate their present or future differences. A third special commission will convene in January, 1955, to discuss the conflict of laws aspects of international maintenance obligations. The next session of the Conference, the eighth, will be held in October 1956.

ARTHUR T. VON MEHREN

SALZBURG SEMINAR IN AMERICAN STUDIES—This summer the Salzburg Seminar in American Studies, in cooperation with the Harvard Law School, conducted at Schloss Leopoldskron its second session devoted to American Legal Thought and Institutions. The session, which lasted from June 14 to July 10, followed the general pattern of the first legal session of the Seminar held in the summer of 1953. The 1954 session was attended by forty-one lawyers, representing various fields of legal work, and drawn from Western Europe. Five members of the Harvard Law School Faculty, Professors Scott, Jaffe, Brown, Kaplan, and von Mehren, and Professor Newman, of the University of California Law School at Berkeley, formed the Faculty for the session. All of the members collaborated in giving a general course, The Institutional Framework of American Law, attended by every student. Professor Scott gave a series of lectures on The Trust and Its Place in American Property Law. Four seminars, out of which each student selected one, were offered: The Foundations of the American System of Administrative Law (Prof. Jaffe), The Distribution of Government Power in a Constitutional Federation (Prof. Brown), Law-Making and Investigating Processes in the United States Congress (Prof. Newman), The Foundations of the Common Law of Contracts (Prof. Kaplan and von Mehren). Classroom work was only a part of the educational process. General conversation, encouraged by the pleasantly informal living and dining arrangements at Schloss Leopoldskron, was of great importance in exchanging ideas and information. Evening discussion panels took up such diverse topics as methods of legal education, the E.D.C., and Congressional investigations. Two mock trials, in which the same defendant was tried for theft, first under continental and then under American procedures, were most suggestive relative to differences between the common and civil law systems.

SUMMER SESSION ON "FEDERALISM"—A summer session on "Federalism" was conducted at the *Institut d'Études Juridiques de Nice* from July 19–August 21, 1954, under the auspices of the Faculty of Law of the University of Aix-en-Provence, with its Professor L. Trotabas as Director. Some 50 or 60 students came from all over France and from other countries for this special program in political science. The instructional staff included many outstanding French professors, also Professor William Rappard of Geneva, Switzerland, Professor M. G. Tenekides of Athens, Greece, and Professor Joseph Dainow of Baton Rouge, Louisiana.

The lectures and conferences were conducted in French and covered numerous aspects of the principal subject, including a philosophical and psychological introduction to the problems of

federalism, the Greek federalism in the fifth to the third century B.C., the history and development of federal ideas, federalism and democracy, and federalism as a social phenomenon. The comparative scope of the program was quite extensive, considering the federal systems of Switzerland and the United States, the European Community of Coal and Steel, the French Union, a European Union, the Role of the Supreme Court in the United States federal system, the applications of federalism in Germany since 1945, and the recent evolution of Yugoslavia.

Located in one of the most colorful spots of the French Riviera, the Institute arranged its classes so as to leave the students ample time to enjoy the delights and the beauties of nature which are so bountifully bestowed upon that region. This did not detract from the seriousness of their program, for the successful completion of which an appropriate certificate was awarded.

JOSEPH DAINOW

Grotius-Stiftung—The *Grotius-Stiftung*, in addition to publishing the *Bibliotheca Grotiana*, annually celebrates the anniversary of Grotius' death, the fourth meeting being held on August 28, 1954, in the Senate Hall of the Maximilianeum, presently seat of the Bavarian diet. The honorary chairman of the *Stiftung*, Germany's venerable poet, Rudolf Alexander Schroeder, presided, and Dr. Hans Keller, Munich City councilor, was in charge of the arrangements as secretary general.

The program included the following lectures: Professor K. A. Wieth-Knudsen, University of Aarhus, "World Politics and International Law;" Mr. L. C. Green, University College, London, "The Standards of International Economic Law;" Professor F. Luis Legaz y Lacambra, Rector of the University of Santiago de Compostela, "The Law of Nations and the Concept of Security;" Professor F. W. v. Rauchhaupt, Heidelberg University, "The Organization of American States and the European Union—a Comparison;" Professor J. Mokre, University of Graz, "State Obligations between Public and International Law;" Professor R. Rie, Clark College, Atlanta University Center, "The Vienna Congress as a Model European Peace Treaty."

VARIA

COMPARATIVE LAW INSTITUTE, UNIVERSITY OF THE SAAR—Within the framework of the Faculty of Law and Economics of the University of the Saar, an Institute has been formed for the comparison and integration of the different European legal systems. The Institute aims at the comparison of Roman and Germanic law, and the comparison of these two systems with those of the Anglo-Saxon countries and of Eastern Europe. It will study the nascent law of the European supranational organizations, beginning with the Coal and Steel Community. Sections have been set up for research in: Mining Law, the Law of the European Communities, Transport and Communications Law, Administrative Law, History of Comparative Law, and the Law of Procedure. The administration of the Institute is bipartite, founded upon the co-operation of representatives of the French and German legal systems. It is under the direction of the Dean of the Faculty of Law and Economics, Professor Bruns, aided by two secretaries general, members of the Faculty, Professors Langrod, Paris, and Lange, Munich.

IN MEMORIAM

ARTHUR K. KUHN—Arthur K. Kuhn, one of the founders and a past president (1941-1943) of the American Foreign Law Association, died in New York on July 8, 1954, at the age of 77. A member of the New York Bar (admitted 1898), he studied at Columbia University (A.B. 1895; A.M. 1896; LL.B. 1897; Ph.D.

1912), University of Zurich, 1904, École de Droit, Paris, 1905, and achieved distinction in practice and as a teacher and author. His contributions to public international law are receiving appropriate attention in other journals. Here it is more fitting to signalize his no less noteworthy contributions to private international law and to comparative law—in the latter field he was one of the pioneers of its revival in this country. The record of his public life was modestly but delightfully portrayed in an autobiography published last year, "Pathways in International Law." His earliest book was a translation of Meili's "International Civil and Commercial Law," supplemented with additions of American and English law (1905); then came "Comparative Study of the Law of Corporations" (1912); "Grundzüge des englisch-amerikanischen Privatrechts" (Zurich, 1915), "Principes de droit anglo-américain" (Paris, 1924); "Comparative Commentaries on Private International Law" (1937). A constant contributor to law journals, a full bibliography of his articles and editorials would be too voluminous for a brief note; attention should be called however, to his pioneer work in air law and to his lectures at The Hague "Les effets de commerce en droit international" and "La conception du droit international privé d'après la doctrine et la pratique aux États-Unis" (8 Recueil des Cours, Académie de Droit International (1926) 125 and 21 Id. (1928) 189) as well as to his work as a member of the Institute of International Law.

In practice, his greatest triumph perhaps was the case of *Johnston v. Compagnie Générale Transatlantique* (242 N.Y. 381 (1926)) where he prevailed upon the Court of Appeals to hold that it was not bound to follow the case of *Hilton v. Guyot* (159 U.S. 170) and that it would enforce, regardless of reciprocity, a foreign judgment.

The printed record however, does not do justice to his constant and effective work at conferences and meetings and as chairman or member of innumerable committees, where his industry, tact, sympathy, learning, ability, experience, and sound judgment made him an unrivalled worker and endeared him to his associates.

PHANOR J. EDER

GEORGE MAURICE MORRIS—It is with great regret that notice is given of the death of George Maurice Morris of Washington, D. C., an outstanding leader in the advancement of the study of comparative law among the lawyers of the various nations. After serving as President of the American Bar Association, Mr. Morris became deeply interested in the activities of the Inter-American Bar Association and in 1944 became chairman of its Executive Committee, serving in that capacity until the close of its VIIIth Conference in São Paulo in March, 1954.

Mr. Morris was one of the founders and active promoters of the International Bar Association, which was organized in New York in 1947 and has held five conferences in various nations. As chairman of its Executive Council and of its House of Deputies, he exerted great influence in its successful activities. During July, 1954, he took an active part in the Vth Conference of the Association at Monte Carlo and prior thereto had taken a trip around the world, during which he greatly stimulated interest in attending that meeting among the lawyers of the nations he visited.

Through his energetic activity, Mr. Morris brought together practicing lawyers, law school professors, judges, and government officials in order that they might discuss developments in their respective fields of the law and endeavor, through comparative studies, to develop greater uniformity and extend the knowledge of the legal systems. At the close of the annual meeting of the American Bar Association in Chicago, he was awarded a citation praising his unselfish participation in these enterprises as well as in the work of the Section of International and Comparative Law of the American Bar

Association and in raising funds for its Research Center.

WILLIAM ROY VALLANCE

EDUARD MAURITS MEIJERS—The Netherlands have suddenly lost their great jurist Meijers (January 10, 1880—June 25, 1954) on the evening of the day on which he had explained his views on the topic under discussion (*Conversie van rechthandelingen*[1]) and its treatment in his draft of a new Civil Code before the crowded annual meeting of the Nederlandse Juristen-Vereeniging.

Meijers began the study of law at the University of Amsterdam in 1897, graduating there in 1903, *cum laude*, with a thesis on "*Dogmatische Rechtswetenschap.*" He practiced law in Amsterdam until 1910, when he was appointed professor of civil law and private international law at the University of Leiden, retiring in his seventieth year. In addition to these subjects, when occasion required, he was able to lecture on Roman law, economics, procedure, and other branches of law. He taught many generations of lawyers; through seminars, the formation of classes to plead cases, and frequent personal contact, through his lucid and plain exposition, his enormous knowledge and mild humor, he had great influence. His position in the University was such that, in November, 1940, upon his dismissal by the German occupying powers and a moving public protest by his younger colleague Cleveringa, the Leiden resistance and the closure of the University ensued. From 1942–1945, he was imprisoned by the Germans in the camps of Barneveld, Westerbork, and Theresienstadt, but, with his wife, survived the war, returning to the Netherlands in 1945 with unbroken spirit.

Through his scientific work and his innumerable publications, Meijers has exercised an influence in the development of law, unequalled in the Netherlands, gradually reaching to foreign countries as in his later years his activities also became more international in scope. I believe that on two principal grounds Meijers deserves recognition in the Western hemisphere: First, on account of the foundation that he laid for the future Netherlands Civil Code, which in 1947 the Queen authorized him, and him alone, to draft. Second, for his pioneer work in the fields of conflict of laws and unification of private law, the results of which will undoubtedly be reflected in legislation in the years to come. In 1935 in the volume prepared by his pupils in celebration of his twenty-fifth anniversary in his professorate, the bibliography of his writings covered 69 pages, and thereafter, except in the war years, it continuously was augmented. Among his books on Dutch law, his work on succession (*Erfrecht*), frequently reprinted since 1910, is outstanding, as well as the revision of Caroli's work on summary procedure (*Het kort Geding*), which not only guides the increasingly busy special jurisdiction of the presiding judge (*President van de Rechtbank*) but also illuminates the history of the French *référé* practice. Meijers always emphasized the importance of practice and judicial decisions as sources of law. From 1912, and especially after 1926, his annotations on hundreds of decisions of the High Court, signed "E.M.M." in the "*Nederlandsche Jurisprudentie*," influenced the Court during the period between the Wars, which was especially fruitful in the evolution of the law. He also wrote articles and answered legal questions in the "*Weekblad voor Privaatrecht, Notaris-ambt en Registratie*, an outstanding periodical. Thus every lawyer and notary in the Netherlands was his pupil.

In the field of legal history, we are indebted to Meijers for a series of publications. He examined many sources in libraries and archives of the Netherlands, France, Italy, and elsewhere. He dis-

[1] "*Conversie*" refers to situations in which a void legal act may be deemed valid as another type of act, the requirements of which are satisfied, if this accords with the "presumed" intention of the parties.

covered the manuscript of Cornelis van Bijnkershoek's *Observationes Tumultuariae*, which he edited with others; between 1928 and 1936 he published four volumes on the Ligurian law of succession, tracing the pre-Germanic origins of customary institutions in the Alpine regions, Flanders, and Brabant; and recently in 1951 with a French colleague he edited the XIVth century judgments of the Maître-Échevin of Metz.

The antecedents of the draft for a new Civil Code are especially noteworthy. When it appears that the formation of new law is largely left by the legislature to the courts and the text and underlying principles of the Code have become inadequate in a changing society, revision of the law demands consideration. From his youth a student of legal analysis, Meijers was not satisfied with piecemeal amendment but advocated total revision. This view, which he expressed in 1928 as well as in the volume celebrating the centenary of the Civil Code (*Gedenkboek Burgerlijk Wetboek*, 1838–1938), was not uncontested; many, including the venerated Amsterdam Professor Paul Scholten, favored further development of the law by judicial interpretation. The great authority of Meijers led to the conviction that he was the only person who could accomplish the enormous task. It appeared that he had for many years made preliminary studies, even while imprisoned without books, without assurance of a concrete result. The work prepared during this period and published in 1948, *Algemene Begrippen van het Burgerlijk Recht*, examines the fundamental conceptions of civil law from the viewpoints of both legal system and concrete legislation. Such conceptions in Meijers' view have only relative value, viz. only insofar as they serve as aids in the rational systematization of the existing rules of law, and lose their significance when their formulation can no longer comprehend the actual law. Thus, in the interpretation of existing and the statement of new law, a method looking to the purpose of law as well as to its history and comparison of laws, is needed.

In 1952–1953, an interrogatory of 48 questions of general and social importance affecting private law was laid before the Second Chamber of the States-General. These were discussed in public session in the summer of 1953, Meijers assisting the Minister of Justice. On April 6, 1954, the first part of the Draft for a new Civil Code, consisting of four books, was presented to the Queen. The general introduction indicates that Meijers continuously consulted the official Commission on Civil Law Legislation, as well as numerous institutions and experts. After Meijers' death, a committee of three have been appointed to complete the work.

The Benelux Convention of 1951, providing for uniform legislation on private international law in Belgium, Luxemburg, and the Netherlands, was mainly drafted by Meijers. He wrote on the subject in the January, 1953 issue of this Journal. Thus far, the Convention has been approved only by Luxemburg. As early as 1914, Meijers had produced a treatise on the history of international private and penal law in France and the Netherlands which threw an entirely new light on the ancient French practice and theories in this field and on the early application of the law of *situs*, a subject to which he returned in his 1934 lectures at the Hague Academy of International Law, and which is still largely unexplored. Meijers has also written on international succession and especially on *renvoi*, a topic which so captivated him that he worked out a draft treaty on *renvoi*. This in a simplified form, as the Convention to determine Conflicts between the National Law and the Law of Domicil, was adopted in 1951 by the Hague Conference. I well remember how sceptical he was when, from many quarters, objections were made to his original proposals, and with what devotion and tenacity he succeeded in large part in securing their acceptance.

Meijers played an important role in the Rome Institute for the Unification of Private Law, particularly as respects the international sale of goods, and in April, 1954, frequently presided at the sessions

on this topic. When, one Sunday, we visited Tarquinia and Viterbo, he astounded us by his detailed knowledge of the history of the Etruscans and the Papacy. He liked travelling and regarded conferences, where he worked hard, as his holidays. Once, on his return from Spain, he wrote a newspaper article on the Water Court of Valencia, and with his wife, he discovered two unknown paintings of William of Orange in an ancient British castle.

In the Netherlands, Meijers was "facile princeps," and as such by all acknowledged. Many were his decorations and titles. He was an honorary doctor of the Universities of Aberdeen, Brussels, Louvain, and Paris, and Associé of the Institut de Droit International. A superior intellect with encyclopaedic knowledge and a fabulous memory, ingenious and quick to perceive, he was blessed with excellent health and tranquillity of mind. He spoke as if playing, at times hesitating or with fragmentary phrase, as if he looked for the right formulation while talking. Eloquence he did not need, as the substance of what he said was so clear and penetrating. In international meetings there were better linguists, but all profited from his remarks.

It was not an easy matter to gain Meijers' confidence—at least it took me years. Yet he was never conceited nor did he impose his views on others. But he knew his own strength and, in conversation with those less gifted, must often have experienced disillusionment. He also had a real sense of humor, full of anecdotes and historical conceits. Then his light blue eyes would twinkle. What stood out was his deep humanity. He knew how to lead; how much quieter a life could he have chosen! After the last war, he fought for the financial restoration of the Jews, on the ground of righteousness and reason, consciously inspired by justice. Self-controlled, he was yet emotional and hence sometimes implacable in personal relations. With dignity he suffered the hardships of the war; unpretentiously, he once gave me a surprising account of how he had applied his knowledge of nationality laws on behalf of those sharing his lot in the concentration camps.

These are only instances taken from a rich life. When Meijers resigned in 1950, the many facets of his work were reflected by his colleagues in a collection of eleven papers. This jurist trained in private law became a national figure, now mourned by his country. His influence, I believe, will make itself felt beyond the borders of the Netherlands to the extent that what he has prepared is realized. I consider it a privilege to write in memory of this man for the jurists of the new world.

J. OFFERHAUS